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**Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Petitioners were convicted in district court in Miami on charges centering on their role as unregistered Cuban agents in monitoring anti-Castro organizations. The trial was the only judicial proceeding in U.S. history to be condemned by the U.N. Human Rights Commission, which found a "climate of bias and prejudice against the accused" so extreme that it failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a fair trial." A panel of the Eleventh Circuit agreed and ordered a retrial in a new venue, but the en banc court reversed, holding that the community's pervasive hostility to the Castro government was categorically irrelevant to the venue inquiry. The dissent called on this Court to grant certiorari. The court of appeals further held that petitioners could not state a *prima facie* claim under *Batson v. Kentucky* because the prosecution had not used all of its peremptory strikes to eliminate every potential black juror.

The questions presented are:

1. Did the Eleventh Circuit apply an erroneous legal standard in holding that petitioners did not establish a right to a change of venue?
2. Does a party's failure to use all of its peremptory strikes to strike all minority members of the juror *per se* preclude a *prima facie* challenge under *Batson v. Kentucky*?
3. Incident to its review of Questions 1 and 2, should this Court review the judgment as it pertains specifically to petitioner Hernandez?

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Ruben Campa, Rene Gonzalez, Antonio Guerrero, Gerardo Hernandez, and Luis Medina respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## **OPINIONS BELOW**

The court of appeals' original panel opinion (Pet. App. 220a) is published at 419 F.3d 1219. The en banc opinion (Pet. App. 90a) is published at 459 F.3d 1121. The panel opinion on remand (Pet. App. 1a) is published at 529 F.3d 980. The opinion of the district court denying a change of venue (Pet. App. 319a) is published at 106 F. Supp. 2d 1317. The district court's opinions denying a change of venue (Pet. App. 339a) and denying a post-verdict judgment of acquittal (Pet. App. 343a) are unpublished. Petitioners' judgments of conviction (Pet. App. 354a) are unpublished.

## **JURISDICTION**

The final judgment of the court of appeals was entered on June 4, 2008. Pet. App. 1a. Timely petitions for rehearing were denied on September 2, 2008. Pet. App. 401a, 404a. Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including January 30, 2009. App. No. 08A435. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The appendix to this brief reproduces the relevant portions of the Fifth and Fourteenth Amendments to the U.S. Constitution and 18 U.S.C. §§ 1111 and 1117. Pet. App. 467a.

### **STATEMENT OF THE CASE**

1. Miami, Florida is home to a massive Cuban-American exile community that provides the base of support for an array of organizations—ranging from the political to the paramilitary—dedicated to overthrowing the Castro government. Prominent among these is Brothers to the Rescue (BTTR), which beginning in 1994 sought to spur a new government through overflights of Cuban territory. Both Cuban and American officials repeatedly warned BTTR to cease its illegal incursions into Cuban airspace, which created a significant risk of a confrontation with the Cuban military. On February 24, 1996, after three BTTR planes nonetheless ignored clear warnings to divert their approaching violations of Cuban airspace, two were destroyed by Cuban fighter planes. Although Cuba has always vigorously maintained that it shot the planes down in the course of yet another incursion into its territory, U.S. air radar indicated that the shootdown occurred a few miles into international airspace.

In 1998, the United States indicted petitioners in Miami. The indictment focused on the charge that petitioners were unregistered Cuban agents and had infiltrated various anti-Castro organizations, including BTTR—which Cuba regards as a terrorist organization. Petitioner Hernandez was specifically

charged with conspiracy to commit murder for providing information on BTTR flights as part of a supposed plan to shoot down the BTTR planes in U.S. jurisdiction, which extends to the international airspace between the United States and Cuba.

Petitioners sought a change of venue from Miami to Fort Lauderdale, thirty miles away. Petitioners invoked the "presumed prejudice" doctrine, which holds that a change of venue is required when strong community sentiment and pretrial publicity (as opposed to bias on the part of individual jurors) create too great a risk that the defendant will not receive a fair trial. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966). Petitioners introduced evidence that the pervasive and violent anti-Castro struggle of the Miami community would not only infect the jury with hostility, but would also cause jurors to fear for their (and their families') safety, livelihoods, and community standing if they acquitted admitted Cuban agents who were charged with, *inter alia*, conspiring to murder opponents of the Castro government. The district court, however, discounted the relevance of anti-Castro hostility on the ground that it "relate[d] to events other than the espionage activities in which Defendants were allegedly involved." Pet. App. 330a. The court held that petitioners had failed to show that it was "virtually impossible" for them to receive a fair trial in Miami, and denied the requested change of venue. *Id.* 323a. In the district court's view, voir dire would provide petitioners with a sufficiently fair trial. *Id.* 337a.

The prosecution exercised nine of its eleven peremptory challenges, as well as both of its additional challenges to alternates, to strike seven

black members of the venire: five during selection of the jury and two alternates. Pet. App. 413a-33a. The final jury included three black members and one black alternate. *Id.* 434a. The district court, however, accepted the government's proffered race-neutral justifications for its strikes, which it held did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 419a-32a.

The district court did agree with petitioners that the charge that petitioner Hernandez had conspired to commit murder, which applies only to an "unlawful killing" (18 U.S.C. § 1111), required the government to prove beyond a reasonable doubt that the conspirators planned to shoot down the BTTR planes in U.S. jurisdiction, rather than during an illegal incursion into Cuban airspace. Pet. App. 453a-56a, 350a. The government itself acknowledged that, "[i]n light of the evidence presented in this trial, [such a requirement] presents an insurmountable hurdle for the United States in this case, and will likely result in the failure of the prosecution on this count." Emergency Pet. for Writ of Prohibition ("Emergency Pet.") at 21, 27, No. 01-12887 (11th Cir. May 25, 2001). The prosecution thus introduced no direct evidence of such an agreement. Instead, it showed that after the shutdown Hernandez congratulated the Cuban government on an operation and that the government had awarded Hernandez a commendation. *Id.* 460a-66a. The prosecution did not explain how this evidence demonstrated a plan to destroy the planes in *international* airspace, given Cuba's insistence that the shutdown had occurred over its *own* territory. *Id.* 435a-39a, 441a-52a. The jury nonetheless convicted on all counts.



2. On petitioners' appeal, a panel of the Eleventh Circuit reversed petitioners' convictions on the ground that they were entitled to a change of venue. Pet. App. 220a-318a. Holding that it was required to "independent[ly] evaluat[e] . . . the facts established in support of [the] allegation[s]" (*id.* 304a), and consider the "totality of the circumstances" (*id.* 309a), the panel found that there was an "unreasonable probability" that petitioners would not receive a fair trial in Miami (*id.* 311a). The court weighed the prejudicial effect of not only anti-Castro sentiment, but also the widespread news coverage of the shootdown and indictments, anniversary ceremonies and "commemorative flights" staged in the Miami area during the trial, and news reports that could have made jurors fear for their safety if they acquitted petitioners. *Id.* 311a-12a. The court further noted an array of improper statements by the prosecutor in closing arguments, such as that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they convicted the "Cuban sp[ies] sent to . . . destroy the United States." *Id.* 288a. Finally, the panel found relevant the publicity surrounding the contemporaneous Elian Gonzalez debacle and that, in a case related to the Gonzalez incident, the government had tellingly taken the position that a fair trial was not possible in the Cuban-American community. *Id.* 311a-12a.<sup>1</sup>

<sup>1</sup> In 1999, six-year-old Elian Gonzalez floated ashore in Florida after the ship on which he left Cuba foundered, killing his mother. When a federal court invalidated an asylum petition filed on his behalf, Border Patrol agents faced off

These facts, the panel found, created a "perfect storm" of publicity and inflamed community passions that denied petitioners a fair trial. *Id.* 316a.

3. The en banc court reinstated petitioners' convictions by a divided vote. Pet. App. 90a-159a. In contrast to the panel's *de novo* review, the en banc court more deferentially held that the district court had not abused its discretion in holding that it was not virtually impossible for petitioners to receive a fair trial in Miami. *Id.* 134a. Further, whereas the panel considered all the relevant circumstances, including the violently anti-Castro sentiment that pervaded Miami, the en banc majority deemed irrelevant as a matter of law all the evidence that "does not relate directly to the defendant's guilt for the crime charged." *Id.* The majority further held that a trial judge's efforts to empanel a neutral jury through voir dire examination and sequestration sufficiently addresses all claims of presumed prejudice. *Id.* 143a.

Judges Birch and Kravitch dissented. Pet. App. 160a-219a. In their view, "this case is one of those rare, exceptional cases that warrants a change of venue because of pervasive community prejudice making it impossible to empanel an unbiased jury." *Id.* 160a. Inviting this Court's intervention, they further recognized that, "in this media-driven environment in which we live, characterized by the ubiquitous electronic communication devices

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against anti-Castro protesters in Miami before Gonzalez was eventually returned to his father's custody in Cuba. The incident sparked massive protests in Miami.

possessed by even children . . . , this case presents a timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age." *Id.* 160a-61a.

4. On remand, a panel rejected petitioners' remaining challenges to their convictions. Pet. App. 1a-71a. Applying circuit precedent, the court held as a matter of law that petitioners had failed even to establish a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986), because "[t]he government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror." Pet. App. 27a (applying *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986)). The validity of the government's stated reasons for striking the black jurors was therefore irrelevant.

By a divided vote, the court also sustained petitioner Hernandez's conviction for conspiracy to commit murder. Like the district court, the court of appeals accepted that the charge required proof that petitioner participated in a plan to shoot down the planes in international airspace. Pet. App. 54a. According to the majority, such proof beyond a reasonable doubt could be found in the fact that Hernandez and the Cuban government had exchanged congratulatory messages (*id.* 55a), notwithstanding that Cuba consistently maintained that the shootdown had occurred in Cuban territory. *Cf. id.* 71a (Birch, J., concurring) (acknowledging that "this issue presents a very close case").

Judge Kravitch dissented. Pet. App. 72a-89a. In her view, the verdict on the murder-conspiracy count was unsustainable in light of the full body of evidence

adduced at trial. Among other things, Cuba's repeated and clear objections to BTTR's violations of its airspace demonstrated that Cuba intended merely to protect its own territorial integrity. *Id.* 87a. For example, in the course of approximately 2000 flights, Cuba had never challenged BTTR planes in international airspace. *Id.* By contrast, the two isolated statements cited by the majority "failed to provide either direct or circumstantial evidence that Hernandez agreed to a shoot down in international airspace." *Id.* Thus, all "the evidence point[ed] toward a confrontation in Cuban airspace." *Id.*

The panel further held that that the district court had erred in enhancing the sentences of three petitioners for conspiring to gather national security information under U.S.S.G. § 2M3.1(a)(1), given that petitioners had never succeeded in doing so. Pet. App. 62a-63a. Recognizing a square conflict with the Ninth Circuit, the court of appeals nonetheless refused to remand for resentencing as to petitioner Hernandez, reasoning that he was already subject to a life sentence on the murder-conspiracy count. *Id.* 70a-71a (citing *United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir. 1990)).

Judge Birch concurred, reiterating that petitioners' "motion for a change of venue should have been granted" in light of "demonstrated pervasive community prejudice," and he once again urged this Court to use the case as a vehicle "to address the issue of change of venue in this internet and media permeated century." Pet. App. 72a (noting that the Court had not considered questions of venue in a quarter-century).

5. This petition followed.

## REASONS FOR GRANTING THE WRIT

The legal conflicts created by the Eleventh Circuit's rulings, amplified by the outcry among domestic and international organizations over the judgment below, demonstrate the urgent need for this Court's intervention. The court of appeals' holding that the prosecution evaded even a *prima facie* inquiry under *Batson v. Kentucky* by not using all of its strikes to eliminate every minority juror represents a serious threat to the *Batson* regime. The Eleventh Circuit's holding that petitioners were not entitled to a change of venue despite the pervasive hostility in Miami to the Castro government—a factor the court of appeals deemed irrelevant as a matter of law—equally merits this Court's review, as Judge Birch recognized in urging that certiorari be granted. And the judgment as to petitioner Hernandez not only illustrates the manifest unfairness of petitioners' trial, but gives rise to an acknowledged circuit conflict. Particularly because this case “implicates serious issues of foreign relations” (*JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964)), certiorari should be granted.

**I. Certiorari Should Be Granted To Review The Eleventh Circuit's Holding That A Party's Failure To Use All Of Its Peremptory Strikes To Eliminate All Minority Jurors Precludes A Finding Of A *Prima Facie* Case Under *Batson v. Kentucky*.**

This Court's foundational ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986), forbids any party from striking a venireperson on the basis of her race. If an objecting party makes out a *prima facie* claim of a *Batson* violation, the striking party must articulate a race-neutral explanation. *See id.* at 96-97. In this case, petitioners objected to the prosecution's use of seven of its peremptory challenges to remove black members of the venire. The district court required the government to proffer race-neutral explanations, which the court accepted. Pet. App. 419a-32a.

Petitioners appealed, challenging the prosecution's stated rationale for striking the black jurors. The Eleventh Circuit, however, rejected petitioners' *Batson* claim at the threshold, holding as a matter of law that petitioners could not establish a *prima facie* claim under *Batson*, and thus that the prosecution had no obligation to explain its strikes. Under the court's categorical rule, no *prima facie* claim arose, and consequently "[n]o *Batson* violation occurred," because "[t]he government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror." Pet. App. 27a (applying *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986)).



Certiorari is warranted because the Eleventh Circuit's decision conflicts with this Court's precedents and seriously threatens the integrity and efficacy of the *prima facie* regime established by *Batson*. The Eleventh Circuit's holding that no *Batson* inquiry is required whenever even one minority juror is seated by a party that does not use all of its strikes cannot be reconciled with the principle that the right to jury selection untainted by racial discrimination is violated by the biased exclusion of even a single juror. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208 (2008). The ruling below—which affords talismanic significance to two factors—equally conflicts with this Court's repeated holding that the *prima facie* inquiry under *Batson* must account for "all the relevant circumstances." *Batson*, 476 U.S. at 96.<sup>2</sup> *Batson* itself directed courts to account for two factors that the Eleventh Circuit's *per se* rule deems irrelevant: "a 'pattern' of strikes against black jurors included in the particular venire" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97.

Even more important, the ruling below provides a ready tool to nullify *Batson*'s central role as an essential guarantee of equality in juror selection by permitting a party to freely engage in race-based

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<sup>2</sup> E.g., *Snyder*, 128 S. Ct. at 1208; *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005); *Johnson v. California*, 545 U.S. 162, 168-69 (2005); *United States v. Armstrong*, 517 U.S. 456, 467 (1996); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991); *Teague v. Lane*, 489 U.S. 288, 295 (1989).

strikes merely through the nicety of allowing at least one minority juror to serve. "At *Batson*'s first step, litigants remain free to misuse peremptory challenges as long as the strikes fall *below* the *prima facie* threshold level." *Miller-El*, 545 U.S. at 267 (Breyer, J., concurring) (emphasis in original). The very prospect of such facile avoidance of a bedrock principle of equal protection "undermine[s] public confidence in the fairness of our system of justice." *Johnson*, 545 U.S. at 172 (quotation marks omitted). And the pernicious effects of the court of appeals' ruling necessarily extend beyond the conduct of prosecutors to the expansive sweep of claims covered by *Batson*: strikes on the basis of not only race but also gender in all manner of both civil and criminal litigation.<sup>3</sup>

It is therefore not surprising that the Eleventh Circuit's significant narrowing of the circumstances that give rise to a *prima facie* claim under *Batson*—and its parallel license to engage in discriminatory juror selection—draws almost no support from decisions in other jurisdictions and squarely conflicts with the precedent of three circuits and one state supreme court. See *Hardcastle v. Horn*, 368 F.3d 246, 256-58 (3d Cir. 2004) (*prima facie* case when government struck twelve of fourteen black venirepersons, and seated one black juror); *Coulter v. Gilmore*, 155 F.3d 912, 914, 918-19 (7th Cir. 1998) (*prima facie* case when government used ten of

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<sup>3</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender); *Georgia v. McCollum*, 505 U.S. 42 (1992) (defendants); *Edmonson*, *supra* (civil litigation).



fourteen peremptory challenges, including nine on black venirepersons, and jury included three black members and two black alternates); *Jones v. Ryan*, 987 F.2d 960, 972-73 (3d Cir. 1993) (rejecting argument that government could not have used "peremptory challenges in a discriminatory manner" merely because government did not use available challenges to "eliminate all black venirepersons"); *United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991) ("prosecutor may not avoid . . . obligation to provide race-neutral explanations . . . simply by forgoing the opportunity to use all of his challenges against minorities"); *State v. Duncan*, 802 So. 2d 533, 549-50 (La. 2001) ("mere presence of one or two perhaps token members of the group on the jury" not "dispositive of whether the *prima facie* requirement is satisfied").

Because the question whether petitioners would ultimately prevail in their claim that the government's stated race-neutral reasons fail to justify its strikes of black venirepersons was not decided by the court of appeals and is not encompassed by the question presented, that issue would be left to be decided by the Eleventh Circuit on remand. But it is worth noting that other courts would find that petitioners made out a *prima facie* claim under *Batson*, as the district court necessarily did in requiring the prosecution to provide race-neutral explanations for its peremptory strikes of multiple black members of the venire. It is settled outside the Eleventh Circuit that "a rate of minority challenges significantly higher than the minority percentage of the venire would support a statistical inference of discrimination" and therefore "strongly

supports a *prima facie* case under *Batson*." *Alvarado*, 923 F.2d at 255. Accord *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (en banc). Here, the prosecution used seven of its eleven peremptory challenges (63.6%) to strike black members of the venire, whereas blacks comprised only 21% of Miami-Dade County's population. That great contrast is comparable to disparities that have been regularly found to support or outright establish a *prima facie* case under *Batson*.<sup>4</sup>

## **II. Certiorari Is Warranted To Review The Exceptionally High Barriers To A Change Of Venue Erected By The Eleventh Circuit.**

The en banc Eleventh Circuit's holding that petitioners were not entitled to a change of venue rests on a series of legal standards that, together and apart, erect essentially insuperable barriers to a defendant's ability to secure a change in venue under the well-settled doctrine of "presumed prejudice." The court of appeals' exceptionally narrow conception of the right to a change of venue cries out for this Court's review because in four distinct respects it cannot be reconciled with the due process right to a neutral jury reflected in this Court's precedents and the rulings of other circuits. As Judge Birch's dissenting opinion recognized, "this case presents a

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<sup>4</sup> *Turner*, 63 F.3d at 813 (56% to 30%); *Alvarado*, 923 F.2d at 256 (57% to 29%); *Coulter*, 155 F.3d at 919 (90% to 29%); *Jones*, 987 F.2d at 971 (75% to 20%); see also *Johnson*, 545 U.S. at 170 (*Batson*'s first step is not intended to be too "onerous").

timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age . . . [and] to clarify circuit law to conform with Supreme Court precedent." Pet. App. 160-61a.

1. The common elements to every charge against petitioners were that each was an agent of the Castro government and that each had attempted to infiltrate organizations dedicated to overthrowing that government, actions that were tied to the deaths of four civilians. Petitioners argued that they could not receive a fair trial in Miami because of the uniquely pervasive and severe anti-Castro hostility in that community, which was significantly amplified by tremendous anger over the shootdowns and the contemporaneous Elian Gonzalez debacle. Even jurors who were not themselves prejudiced, petitioners argued, would sensibly fear for their and their families' safety and livelihood if they voted to acquit Cuban agents in such an environment. The essence of petitioners' submission was thus not that jurors in Miami were prejudiced towards them personally, but that a jury would inevitably include at least some members who could not truly serve neutrally due to the Castro government's overhanging central role in the case.

The en banc Eleventh Circuit deemed petitioners' argument to be irrelevant as a matter of law, categorically holding that "prejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not directly relate to the defendant's guilt for the crime charged." Pet. App. 134a. The majority relied on long-settled circuit precedent holding that "only media reports

linked directly to the defendant ha[ve] 'evidentiary value' in assessing his presumed prejudice claim." *Id.* n.196 (quoting *Meeks v. Moore*, 216 F.3d 951, 963 n.19, 967 (11th Cir. 2000)). See also, e.g., *United States v. Awan*, 966 F.2d 1415, 1428 (11th Cir. 1992). The court accordingly concluded that evidence of "general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter"—in contrast to the much narrower group of targeted "articles that did relate to the defendants and their alleged activities in particular"—was *per se* irrelevant to the determination whether petitioners could receive a fair trial in Miami. Pet. App. 136a. Petitioners thus had no right to a change of venue notwithstanding that, as the dissent explained, the district court "made no findings regarding the prejudice within the community." *Id.* 211a (emphasis removed).

Certiorari is warranted because the Eleventh Circuit's decision conflicts with this Court's precedents and defies common sense. The court of appeals' error is easily illustrated by the hypothetical trial of a minority defendant for a serious crime with racial overtones in a community with a long history of pervasive racism. In such a case, it blinks reality to hold that the community's prejudices—though directed at a class to which the defendant belongs rather than at the defendant personally—have no effect on his ability to secure a fair trial. So too in this case it makes no sense to hold as a matter of law that the community's overwhelming hostility towards the Castro government and its supporters would have no effect in petitioners' trial for serving as spies for

that government, particularly when civilian deaths resulted.

This Court's decisions thus sensibly preclude the Eleventh Circuit's refusal to consider an array of evidence that logically informs whether attitudes of the community necessitate a change of venue. This Court has repeatedly held that courts must assess the prospect that the defendant will not receive a fair trial with jurors untainted by fear or bias in light of the "totality of [the] circumstances." *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *see also Dobbert v. Florida*, 432 U.S. 282, 303 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966). As the en banc dissent recognized, "[a] court does not undertake a totality of the circumstances review by confining itself to community publicity which relates only to the guilt or innocence of the defendant." Pet. App. 209a.

Consistent with this Court's precedents, other courts would have held that the pervasive hostility in Miami was a proper basis for holding that petitioners would not receive the fair trial guaranteed by the Constitution without a change of venue. Those courts reject any effort to limit the evidence relevant to the venue inquiry to evidence "directly relate[d] to the defendant's guilt." Pet. App. 211a (Birch, J., dissenting). *See United States v. Bangert*, 645 F.2d 1297 (8th Cir. 1981) ("impartial jury" must be "free from outside influences, including potentially prejudicial news media reports of events *connected with the matter on trial*" (emphasis added)); *United States v. De Peri*, 778 F.2d 963, 972 (3d Cir. 1985) (presumed prejudice inquiry looks at totality of the

circumstances); *Whitehead v. Cowan*, 263 F.3d 708, 721 (7th Cir. 2001) (same).

Illustrative is *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), in which the Ninth Circuit reversed the district court's denial of a change of venue because it failed to account for significant publicity about the crime, most of which had no bearing on the defendant's guilt. The court found that the venue was "saturated with prejudicial and inflammatory media publicity about the crime." 428 F.3d at 1211. In stark contrast to the Eleventh Circuit's holding that pre-trial publicity about the shutdown and the jurors' regular exposure to a monument to BTTR were categorically irrelevant, the Ninth Circuit placed significant weight on analogous press coverage and the fact that a "statue commemorating fallen police officers was unveiled [and the] statute . . . was located across the street from the Riverside County courthouse where Daniels was tried." *Id.*

2. This Court's intervention is further required because the Eleventh Circuit erroneously assessed the limited remaining evidence it was willing to consider under that court's exceptionally high bar to a change of venue. The en banc majority explained that, to secure a change of venue, the defendant must show that a "fair trial was impossible." Pet. App. 131a. In the Eleventh Circuit, "[t]he presumed prejudice principle is rarely applicable and is reserved for an extreme situation," which makes the defendant's burden "an extremely heavy one." *Id.* 132a-33a (citations and quotation marks omitted). That stringent standard tracks a uniform body of Eleventh Circuit decisions holding, both before and



after the en banc ruling in this case, that a defendant asserting a claim of presumed prejudice cannot secure a change of venue unless it otherwise will be "virtually impossible" to secure a fair trial.<sup>5</sup> Five circuits similarly hold that presumed prejudice justifies a change in venue only if a fair trial is "virtually impossible" or "impossible."<sup>6</sup>

That standard cannot be reconciled with the holdings of four other circuits, which apply a substantially more lenient test that inquires whether it is "reasonably likely" that the defendant can receive a fair trial in the community.<sup>7</sup> The highest courts of nine states agree.<sup>8</sup> Two decades ago, two

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<sup>5</sup> *E.g.*, *Gaskin v. Sec'y, Dep't of Corr.*, 494 F.3d 997, 1005 (11th Cir. 2007); *Henyard v. McDonough*, 459 F.3d 1217, 1226 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1818 (2007); *Meeks*, 216 F.3d at 961; *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985). See also Pet. App. 323a (district court applying "virtually impossible" standard); *id.* 132a (en banc majority referring to the standard as "reasonable certainty").

<sup>6</sup> *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006); *United States v. Edmond*, 52 F.3d 1080, 1099 (D.C. Cir. 1995); *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir. 1991); *Simmons v. Lockhart*, 814 F.2d 504, 507 (8th Cir. 1987); *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982) (overruled in non-relevant part by *Garrett v. United States*, 471 U.S. 773 (1985)).

<sup>7</sup> *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999); *Washington v. Murray*, 952 F.2d 1472, 1484 (4th Cir. 1991); *United States v. Garza*, 664 F.2d 135, 139-40 (7th Cir. 1981); *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972).

<sup>8</sup> In addition to the cases cited in the next paragraph of the text, see *State v. Baker*, 320 S.E.2d 670, 676 (N.C. 1984); *State v. Rupe*, 743 P.2d 210, 220 (Wash. 1987); *People v. Gendron*, 243

Justices urged this Court to grant certiorari to resolve the conflict among state supreme courts on this question. *Brecheen v. Oklahoma*, 485 U.S. 909, 911 (1988) (Marshall, J., dissenting from the denial of certiorari) ("In this vacuum of constitutional precedent, states have taken divergent paths.").

Of note, courts have repeatedly stressed that the difference between the two competing standards is significant, not one of mere terminology. *People v. Lewis*, 43 Cal. 4th 415, 447 (Cal. 2008) ("Reasonably likely' in this context means something less than 'more probable than not,' but something more than 'merely possible.'" (citation omitted)); *McBride v. Delaware*, 477 A.2d 174, 185-86 (Del. 1984) (rejecting prior stringent standard in favor of "reasonable probability" inquiry, a "lesser standard of proof"); *Pollard v. Dist. Court of Woodbury County*, 200 N.W.2d 519, 521 (Iowa 1972) (That the defendant "did not demonstrate conclusively she cannot receive a fair trial . . . . is not the test . . . . [T]he test is whether a 'reasonable likelihood' exists that the voir dire jury examination or a continuance will not be sufficient to allow a fair trial."); *Brown v. Oklahoma*, 871 P.2d 56, 61-62 (Okla. Crim. App. 1994) (rejecting "virtually impossible" standard on the ground that it "makes a change of venue very difficult to achieve"); *State v. James*, 767 P.2d 549, 552 (Utah 1989) (applying reasonable likelihood standard, which is less than "more likely than not"); cf. *Fisher v. State*, 481 So.2d 203 (Miss. 1985).

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N.E.2d 208 (Ill. 1968); *State v. Beier*, 263 N.W.2d 622 (Minn. 1978).



The “extremely heavy” burden avowedly imposed by the Eleventh Circuit (Pet. App. 133a) is all but impossible to satisfy and conflicts with this Court’s precedent. The en banc majority specifically erred in its belief that “the Supreme Court has ruled in [*Dobbert*, 432 U.S. at 303] that we cannot presume prejudice in the absence of a ‘trial atmosphere . . . utterly corrupted by press coverage.’” Pet. App. 134a. *Dobbert* was a very different case. There, the defendant sought a change of venue *not* based on community prejudice, but instead based merely on the fact that there had been extensive but neutral pretrial publicity about his case. By contrast, a distinct claim like petitioners’ that pervasive fear and hostility in the community risk empanelling a jury that will not assess the facts neutrally is controlled by the holding of *Sheppard*, 384 U.S. at 363, that courts must ask only whether there is a “reasonable likelihood” that the defendant will not receive a fair trial. Accord 2 Charles Alan Wright, *Federal Practice & Procedure* § 342, at 378-79 (3d ed. 2005) (describing “reasonable likelihood” as correct standard in light of exhaustive review of existing caselaw).

3. This Court’s review is also warranted because the Eleventh Circuit has imposed a still further significant obstacle to securing a change of venue by holding that a district court’s denial of such a request is reviewed “for an abuse of discretion.” Pet. App.

131a. That holding is consistent with the precedent of eight other circuits.<sup>9</sup>

By contrast, two circuits and the highest courts of three states engage in a substantially more searching *de novo* review of a district court's refusal to order a change of venue under the presumed prejudice doctrine. See, e.g., *United States v. Skilling*, --- F.3d ---, 2009 WL 22879, at \*22 (5th Cir. Jan. 6, 2009) (“[w]e review *de novo* whether presumed prejudice tainted a trial, and this review includes conducting an independent evaluation of the facts”) (quotation marks omitted); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998); *People v. Hamilton*, 774 P.2d 730, 737 (Cal. 1989); *State v. Reynolds*, 836 A.2d 224, 367 (Conn. 2003); *Lloyd v. District Court*, 201 N.W. 2d 720, 722 (Iowa 1972).

The Eleventh Circuit's substantially less rigorous standard of review renders it all but impossible for parties to secure a reversal of a district court's refusal to order a change of venue and cannot be reconciled with this Court's precedents. In *Sheppard*, this Court held that “appellate tribunals have the duty to make an independent evaluation of the

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<sup>9</sup> *United States v. Nettles*, 476 F.3d 508, 513 (7th Cir. 2007); *United States v. Angelus*, 258 F. App'x 840, 844 (6th Cir. 2007); *United States v. Higgs*, 353 F.3d 281, 308 (4th Cir. 2003); *United States v. Allee*, 299 F.3d 996, 999-1000 (8th Cir. 2002); *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001); *Rodriguez-Cardona*, 924 F.2d at 1158 (1st Cir.); *United States v. Edmond*, 52 F.3d 1080, 1099 (D.C. Cir. 1995); *United States v. Moran*, 236 F.2d 361, 362 (2d Cir. 1956).

circumstances" that give rise to the prospect that the defendant will be unable to receive a fair trial in the jurisdiction. 384 U.S. at 362. That more searching inquiry, the Court explained, is necessary to protect the defendant's due process right to "a trial by an impartial jury free from outside influences," "[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors." *Id.* By contrast, it is hard to imagine a case so extreme that the Eleventh Circuit would find an "abuse of discretion" in the district court's finding that it was not "virtually impossible" to hold a fair trial. The ruling below thus renders the "presumed prejudice" doctrine a dead letter in practice.

4. This Court's intervention is equally warranted to review the Eleventh Circuit's suggestion that, when a trial court presides over a trial implicating community hostility, a defendant's right to a fair trial is sufficiently preserved merely by assessing the neutrality of individual jurors through voir dire. Pet. App. 133a. The Eleventh Circuit's holding erroneously collapses the distinction drawn by "clearly established Supreme Court precedent distinguishing between cases involving presumed prejudice—when 'the setting of the trial [is] inherently prejudicial'—and actual prejudice—when review of both the jury voir dire testimony and the extent and nature of the media coverage indicates 'a fair trial [was] impossible.'" *Nevers v. Killinger*, 169 F.3d 352, 364 (6th Cir. 1999) (quoting *Murphy*, 421 U.S. at 798). The latter addresses claims that particular members of the venire exhibited bias,

which accordingly calls for the examination of individual jurors through voir dire.

By contrast, the very point of the “presumed prejudice” doctrine is to identify cases in which community prejudice is sufficiently pervasive that “a court could not believe the answers of the jurors.” *Beck v. Washington*, 369 U.S. 541, 557 (1962). *E.g.*, *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971) (while the exercise of challenges to the venire can be useful, it “is not always adequate to effectuate the constitutional guarantee” and “[o]n at least one occasion this Court has explicitly held that only a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment.”); *Rideau v. Louisiana*, 373 U.S. 723, 7227 (1963) (finding presumed prejudice “without pausing to examine a particularized transcript of the voir dire examination of the members of the jury”); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

Other courts thus correctly hold—consistent with this Court’s precedent but in irreconcilable conflict with the Eleventh Circuit—that findings of presumed prejudice do not call for the district court to undertake juror voir dire at all. *E.g.*, *House v. Hatch*, 527 F.3d 1010, 1023 (10th Cir. 2008) (“In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors.”); *State v. Nelson*, 803 A.2d 1, 36 (N.J. 2002) (“The existence of such presumed prejudice obviates the need for conducting voir dire.”). *See generally, e.g.*, *United States v. Grace*, 408 F. Supp. 2d 998, 1015 (D. Mont. 2006) (noting “the great many Ninth Circuit cases

applying the presumed prejudice test without considering the results of voir dire”).

5. The many courts that reject the Eleventh Circuit’s singularly demanding standards for establishing presumed prejudice would conclude that petitioners were entitled to a trial outside of the uniquely hostile environment created by the anti-Castro sentiment of Miami. No further evidence of that fact is needed than that the original panel in this case—which like other courts applied *de novo* review and examined the totality of the relevant evidence (see *supra* at 4-6)—held that petitioners *were* entitled to a change of venue. See generally Pet. App. 220a-318a. The government itself successfully sought en banc review precisely on the ground that the panel’s distinct legal standards were outcome determinative, arguing that the panel’s decision turned on “its own *de novo* review of facts” and “the community’s political and social views about issues other than the defendants’ commission of the charged crimes.” Resp. Pet. for Rehearing En Banc 6.

It is hard to imagine a stronger case for a change of venue than this case. As the Working Group on Arbitrary Detention of the U.N. Human Rights Commission concluded, the “climate of bias and prejudice against the accused” was so extreme that the proceedings failed to meet the “objectivity and impartiality that is required in order to conform to the standards of a fair trial” and “confer[red] an arbitrary character on the deprivation of liberty.” Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add.1, at 65 (Oct. 19, 2005). Dozens of organizations and individuals around the world—

including, for example, numerous Nobel Laureates, national parliaments, and parliamentary committees on human rights—harshly criticized the proceedings. Pet. App. 469a-90a. No criminal trial in modern American history has been condemned in such a fashion.

At the time of petitioners' trial, there were more than 700,000 Cuban-Americans living in Miami. Of those, 500,000 remembered leaving their homeland, 10,000 claimed to have had a relative who was murdered in Cuba, 50,000 reporting having a relative who was tortured in Cuba, and thousands were former political prisoners. Memorials were subsequently erected in honor of the BTTR victims, and streets within the Miami-Dade County community were renamed for them. The trial judge herself referred to the "impassioned Cuban exile community residing within this venue" during the trial. *Id.* 292a.

Just before the district court held oral argument on the question of venue, the Miami area was convulsed by the largest public demonstration in the city's history with over 100,000 persons in the streets shouting anti-Castro slogans. Prospective jurors had recently witnessed anti-Castro groups turn parts of Miami into an armed camp in an effort to prevent federal agents from executing a court order to return Elian Gonzalez to his father.

The record demonstrates moreover that anti-Castro sentiment in Miami has manifested itself in a pattern of violence directed at those deemed not sufficiently hostile to the Castro regime. See Pet. App. 297a-98a; Human Rights Watch, Report, *Dangerous Dialogue: Attacks on Freedom of*



*Expression in Miami's Cuban Exile Community* (1992). Businesses pursuing commerce with, or aid to, Cuba have been targeted by bombers. Pet. App. 239a.

Voir dire revealed that many jurors feared for their safety or community standing if they acquitted petitioners. When asked about the impact any verdict in the case might have, one venireperson stated that he "would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be." Pet. App. 247a. Another, a banker, was "concern[ed] how . . . public opinion might affect [his] ability to do his job" because he dealt with developers in the Hispanic community and knew that the case was "high profile enough that there may be strong opinions" which could "affect his ability to generate loans." *Id.* 248a.

Other venire members indicated negative views towards Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury. Three of these ended up serving on the jury, including one as the foreperson. The district court denied petitioners' request to excuse one potential juror who admitted that she knew the daughter of one of the downed pilots, had visited the pilot's home, and had attended his funeral. Pet. App. 251a & n.82.

From the first day of deliberations, jurors complained of feeling intimidated by the TV cameras following them. Well into the second week of jury selection, a prospective juror complained of media harassment as he left the courthouse. Pet. App.

412a. As late as March 13, nearly four months into the trial, the court noted on the record that the jurors were still being harassed by cameras. Pet. App. 440a. See Human Rights Watch, Report, *Dangerous Dialogue* 9 (1994) (Spanish-language media has long publicly identified Cuban sympathizers).

The prejudice to petitioners was significantly amplified by serious misconduct by the prosecution. At closing, the government commented that the defendants had joined a "hostile intelligence bureau . . . that sees the United States of America as its prime and main enemy" and that the jury was "not operating under the rule of Cuba, thank God." Pet. App. 457a. The prosecutor also accused the defendants of "coming to the United States to destroy the United States." *Id.* 458a. The district court sustained the defendants' objections to these and other statements, but obviously not until after they were heard by the jury.

Despite opposing petitioners' requests for a change of venue from Miami to nearby Fort Lauderdale, the government itself argued in another case for a change of venue just a few months after petitioners were sentenced. The government argued in an employment case related to the Elian Gonzalez matter that

the inhabitants of Miami-Dade County are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the instant case solely on the evidence presented in the courtroom. Under such circumstances and strongly held



emotions, and in light of the media coverage, it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County.

Gov't Venue Mot., *Ramirez v. Ashcroft*, No. 01-cv-4835 (S.D. Fla. June 25, 2002).

In this case, petitioners requested minimal relief—moving the trial to Fort Lauderdale, a neighboring division within the same judicial district that is a mere thirty miles away. The Miami community's hostility towards the Cuban government assured that petitioners could not otherwise receive a fair trial. Because other courts would have held that a change of venue should have been granted, certiorari should be granted.

### **III. This Court's Review Of The Judgment As It Pertains To Petitioner Hernandez Is Warranted.**

1. The fact that pervasive anti-Castro hostility in Miami and publicity regarding the shootdowns created a substantial risk that the jury would not neutrally decide the charges against petitioners is illustrated perfectly by the conviction of petitioner Hernandez for conspiracy to commit murder despite the absence of any actual evidence to support such a grave charge, for which the district court sentenced him to life in prison.

The district court and Eleventh Circuit both recognized that Hernandez's guilt depended on proof beyond a reasonable doubt not merely that he participated in a plan to shoot down the BTTR planes, but also that the agreement planned for the shootdown to *occur* outside Cuban airspace. Pet.

App. 54a, 453a-56a, 350a. Federal law did not prohibit Hernandez from participating in a Cuban-government plan to shoot down the planes during an incursion into Cuba's sovereign territory. A conspiracy is "an agreement to commit an unlawful act." *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)). In this case, the alleged unlawful act is "the unlawful killing of a human being with malice aforethought . . . [w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111; *id.* § 1117 (criminalizing conspiracy to violate § 1111).

Neither U.S. nor Cuban law deemed it "unlawful" for Cuba to defend its territorial integrity by destroying the planes if they violated its airspace. The federal murder statute applies only in U.S. jurisdiction, and Cuba's assertion that its domestic law permits it to defend its airspace is not only uncontested but immune from challenge in U.S. courts. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964). "A shoot down in Cuban airspace would not have been unlawful; thus, Hernandez could not have been convicted of conspiracy to murder unless the Government proved beyond a reasonable doubt that he agreed for the shoot down to occur in international, as opposed to Cuban, airspace." Pet. App. 84a (Kravitch, J., dissenting); *see also id.* 54a-55a (majority opinion deciding the case on that premise).<sup>10</sup>

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<sup>10</sup> See generally *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (a nation, "as sovereign, has the inherent

The overwhelming proof at trial was that, on the ambitious assumption that Hernandez was aware of a plan to shoot down the planes at all, there manifestly was no conspiracy to do so in U.S. jurisdiction. To the contrary, all "the evidence point[ed] toward a confrontation in Cuban airspace." Pet App. 87a (Kravitch, J., dissenting). In the period beginning in 1994 in which BTTR planes repeatedly violated Cuban airspace,<sup>11</sup> "every communication between Cuba and the FAA discussed the consequences for invading Cuba's sovereign territory" (*Id.*; ICAO Report §§ 2, 3 (detailing Cuban communications with U.S. State Department and FAA)). BTTR's leader "testified that in his nearly 2000 BTTR flights, [Cuban] MiGs never confronted him in international airspace." Pet App. 87a (Kravitch, J., dissenting). Finally, "communications between Cuba and Hernandez speak of a confrontation only if BTTR 'provokes' Cuba." *Id.* Given the Cuban government's consistent focus on the BTTR flight's incursion into Cuban airspace, these communications are only reasonably

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authority to protect . . . its territorial integrity"); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 259 (D.C. Cir. 1980) ("every nation has exclusive sovereignty over the airspace above its territory"); 26 C.F.R. § 1.911-2(h) ("territory under the sovereignty" of foreign government includes "the air space over the foreign country").

<sup>11</sup> See Report of the ICAO Fact-Finding Investigation, The Shooting Down of Two U.S. Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996, App. B to Council Document C-WP/10441, ¶¶ 2.1.1.1, 2.1.2.3, 2.1.3.1 (June 19, 1996) ("ICAO Report").

understood to mean provocation *by invasion of Cuba's sovereign territory*.

The Eleventh Circuit majority ignored all this proof, and cited no direct evidence of a plan to shoot down the planes in U.S. jurisdiction. Instead, the majority relied on two isolated pieces of evidence that, to the extent they are relevant at all, support Hernandez's innocence claim. According to the majority,

Hernandez's statement after the shootdown that the operation ended successfully alone allows a finding by a reasonable jury that the conspirators intended to commit an unlawful killing. If the plan had been to prepare Cuba to defend itself with a justified shootdown over Cuba, then the plan would have failed. What occurred, and what Hernandez called a success, was an unjustified killing in the special maritime and territorial jurisdiction of the United States. A reasonable jury could take Hernandez at his word and find that what occurred was what Hernandez intended.

Pet. App. 54a. The majority also thought that the same inference could fairly be drawn from Cuba's "recognition for [petitioner's] outstanding results achieved on the job." *Id.*<sup>12</sup>

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<sup>12</sup> Because the majority looked to whether a "reasonable" jury "could convict" Hernandez (Pet. App. 14a), there is a direct parallel between this case and No. 08-559, *McDaniel v. Brown* (cert. granted Jan. 26, 2009).

If anything, this evidence supports precisely the opposite inference. Cuba has always maintained that the shootdown was *in Cuban territory*. *Id.* 435a-39a, 441a-52a. There is no evidence at all that Hernandez rejected that account, and that Hernandez was an Cuban agent makes it exceptionally unlikely that he did so. It was moreover entirely plausible that Cuba would have intended the shootdown to occur over its own territory but inadvertently struck the planes over international waters: the Cuban jets were flying within the Cuban airspace's very confined bounds at 540 miles per hour and launched missiles that traveled even more quickly; the BTTR planes, in turn, were at the very least quite close to Cuba, having been shot down no more than 10 miles into international airspace. Thus, to the extent that any relevant inference can be drawn from the evidence that Hernandez and Cuba believed that Hernandez's acts had been a success, it is that the planes were intended to be shot down in Cuban territory, not U.S. jurisdiction.

At the very least, the isolated statements cited by the majority do not establish proof beyond a reasonable doubt when considered in the context of all the proof that Cuba intended to confront the planes within its own airspace. *See supra*. Indeed, the government itself frankly acknowledged that the prosecution would be essentially doomed by the requirement that it prove beyond a reasonable doubt that there was a plan to shoot down the planes in international airspace. Emergency Pet. at 21, 27. Though a sufficiency-of-the-evidence review requires drawing inferences in the prosecution's favor, it nonetheless requires consideration of "all of the

evidence" and the inferences drawn must be "reasonable." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis added and deleted).

The Eleventh Circuit moreover failed to heed this Court's admonition that courts must "scrutinize the record . . . with special care in a conspiracy case." *Anderson v. United States*, 417 U.S. 211, 224 (1974). That more searching review is required because "[w]ithout the knowledge, the intent cannot exist," and because, "to establish the intent, the evidence of knowledge must be clear, not equivocal." *Ingram v. United States*, 360 U.S. 672, 680 (1959) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)). Without these protections, "charges of conspiracy" may "be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Id.* Grounding a conviction that carries a life sentence for a grave charge such as conspiracy to murder on isolated *post hoc* snippets plucked from a massive trial record and considered in isolation invites conspiracy convictions that rest on "a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J. concurring).

In this case, no reasonable juror could conclude that after consistently pursuing diplomatic channels to address incursions into its sovereign airspace, Cuba suddenly developed a conspiracy to shoot down planes that were traveling in international airspace. Such an inference would require concluding that Cuban intended to initiate an unprovoked war with



the United States. The verdict can thus only fairly be understood as further indicating the fear and hostility that inevitably influenced the jury's deliberations.

2. This Court's review is finally warranted because the Eleventh Circuit itself recognized that its refusal to order a resentencing of petitioner Hernandez conflicts with the precedent of the Ninth Circuit. Pet. App. 70a-71a. The court of appeals held that the district court erred in sentencing three of the petitioners for conspiring to gather national security information under U.S.S.G. § 2M3.1(a)(1) because petitioners never succeeded in doing so. Pet. App. 62a-63a, 70a. The Eleventh Circuit nonetheless refused to remand the case for resentencing as to petitioner Hernandez because he already faced a concurrent life sentence on the conspiracy to murder charge. Pet. App. 70a-71a.

The Eleventh Circuit's refusal to remand Hernandez's case for a further sentencing proceeding is consistent with the law of five other circuits but—as the Eleventh Circuit expressly recognized—conflicts with Ninth Circuit precedent.<sup>13</sup> The ruling below also conflicts with this Court's jurisprudence,

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<sup>13</sup> Compare *United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir. 1990) (court may not “place upon [the defendant] the risk” that prejudice from erroneous concurrent sentence “will manifest itself in the future”) with, e.g., *United States v. Pierre*, 484 F.3d 75, 90-91 (1st Cir. 2007); *United States v. Rivera*, 282 F.3d 74, 77-78 (2d Cir. 2000); *United States v. Pardo*, 25 F.3d 1187, 1194 (3d Cir. 1994); *United States v. Olunloyo*, 10 F.3d 578, 582-83 (8th Cir. 1993); *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir. 1997).

which—subsequent to the sentencing in this case—for the first time deemed the Sentencing Guidelines not to be binding. *See United States v. Booker*, 543 U.S. 220 (2005). The appropriate course in this case was accordingly to remand the case for the district court to exercise its sentencing discretion in the wake of the court of appeals' holding that § 2M3.1(a)(1) was inapplicable.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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January 2009

No. 08- 08 987 JAN 31 2009

IN THE OFFICE OF THE CLERK  
**Supreme Court of the United States**

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

**APPENDIX TO THE PETITION FOR A WRIT  
OF CERTIORARI**

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PETITIONER'S APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Nos. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY,  
A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A.  
ISELIN, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE  
1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A.  
OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2,  
ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ,  
A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF APPELLEE,

*v.*

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL  
VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL  
VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY,  
A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO,  
A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT,  
RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A.  
CAMILO, A.K.A. OSCAR, , DEFENDANTS-APPELLANTS.

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[Decided: June 4, 2008  
Filed: June 4, 2008]

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Before: BIRCH, PRYOR, and KRAVITCH, Circuit Judges.

## OPINION

PRYOR, Circuit Judge:

Five agents of the Cuban Directorate of Intelligence who were members of *La Red Avispa* (in English, "The Wasp Network") challenge their convictions and sentences for their espionage against the military of the United States and Cuban exiles in southern Florida. A special mission of the Cuban network, Operacion Escorpion, led to the murder of four men when Cuban military jets shot down two private aircraft over international waters in 1996. Each Cuban agent was convicted of espionage charges, and one agent was convicted of conspiracy to murder, following a trial in Miami that lasted more than six months. Our Court, en banc, affirmed the denial of the Cuban agents' motions for a change of venue and a new trial and remanded this appeal to this panel for consideration of the remaining issues. *United States v. Campa*, 459 F.3d 1121, 1154-55 (11th Cir.2006) (en banc).

The Cuban agents raise a host of issues on appeal. The Cuban agents challenge rulings about the suppression of evidence from searches conducted



under the Foreign Intelligence Surveillance Act, sovereign immunity, discovery of information under the Classified Information Procedures Act, the exercise of peremptory challenges, alleged prosecutorial and witness misconduct, jury instructions, the sufficiency of the evidence in support of their convictions, and several sentencing issues. We conclude that the arguments about the suppression of evidence, sovereign immunity, discovery, jury selection, and the trial are meritless, and sufficient evidence supports each conviction. We also affirm the sentences of two defendants, but we remand in part for resentencing of the other three defendants.

## I. BACKGROUND

Before we address the merits of this appeal, we review four matters. First, we review the relevant facts in the trial record. Second, we review the procedural history in the district court. Third, although we have previously described the details of the trial, *Campa*, 459 F.3d at 1126-42, we describe the details that are relevant to the issues that are now before this panel. Finally, we review the convictions and sentences of each Cuban agent.

### A. Facts

The primary intelligence agency of Cuba, the Directorate of Intelligence, maintained an organization for espionage in South Florida known as *La Red Avispa*. Gerardo Hernandez, Ruben Campa (also known as Fernando Gozales-Llort), and Luis Medina III (also known as Ramon Labañino-Salazar) were intelligence officers in the Wasp Network. They supervised network agents, including Rene Gonzalez

and Antonio Guerrero. Among other things, the Wasp Network reported information to Cuba about the operation of military facilities, political and law enforcement activities, and activities of organizations based in the United States who support a change in the regime of Cuba.

One organization that the Wasp Network targeted is known as "Brothers to the Rescue," which is a Miami-based organization that flew small aircraft over the Florida straits in efforts to rescue rafters fleeing Cuba. Gonzalez and an unarrested codefendant, Juan Pablo Roque, successfully infiltrated the Brothers organization. In January 1996, aircraft of Brothers twice dropped leaflets over Havana. Some of these leaflets contained excerpts from the Universal Declaration of Human Rights of the United Nations.

Because the Cuban government believed that, during some flights, pilots of Brothers intentionally violated Cuban airspace, the Cuban government launched a special mission codenamed "Operation Scorpion" "in order to perfect the confrontation of" the "[counterrevolutionary] actions of [Brothers]." Cuban intelligence officers transmitted encrypted radio messages that directed Hernandez to instruct Gonzalez and Roque to determine the flight plans of Brothers. Hernandez was instructed to inform Cuban intelligence officials when Gonzalez and Roque would be flying in aircraft of Brothers. Gonzalez and Roque were not to fly from February 24 through 27, and they were instructed to use code phrases during radio communication with Cuban air traffic control if they could not avoid flying on those dates.

On February 24, 1996, three aircraft of Brothers

flew toward Cuba, but two did not return. While the planes were flying away from Cuba in international airspace, Cuban military jets shot down two of the aircraft and killed two pilots, Mario de la Peña and Carlos Costa, and two passengers, Armando Alejandro and Pablo Morales. A third plane, flown by Jose Basulto, the founder and leader of Brothers, escaped.

In addition to his infiltration of Brothers, Gonzalez performed several other functions for the Cuban government under Hernandez's supervision. Gonzalez acted as a fraudulent informant to the Federal Bureau of Investigation. He monitored the activities of other Cuban-American organizations in Florida, and he sought for his wife, who was also an agent of the Cuban Directorate of Intelligence, the assistance of a Member of Congress to enter the United States.

Medina and Campa also engaged in other activities. Medina and Campa constructed false identities, which they corroborated with numerous fraudulent identification documents such as United States passports. Medina and Campa supervised attempts by other agents to penetrate the Miami facility of Southern Command, which plans and oversees operations of all military forces of the United States in Cuba, Latin America, and the Caribbean.

Under the supervision of Medina, Campa, and Hernandez, Guerrero obtained employment as a laborer at the Key West Naval Air Station. Guerrero sent his supervisors frequent and detailed reports about the movement of aircraft and military personnel, and comprehensive descriptions of the

layout of the facility and its structures. Guerrero reported on the renovations of buildings that were to be used for top-secret activities, and he was urged to determine the purpose for which new top-secret facilities would be used.

### *B. Procedural History*

Much of the evidence that the government introduced at trial was obtained through searches that were conducted under the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1845 (2000), and approved by the court created by that Act. Campa moved to suppress this evidence and argued that the government had failed to adhere to the requirements of the Act. After the Attorney General filed an affidavit that stated that an adversary hearing on the motion to suppress would harm national security, the district court reviewed the motion and affidavit *in camera*. See 50 U.S.C. § 1806(f). The district court denied the motion to suppress.

Before trial, the government requested and received an ex parte hearing under section four of the Classified Information Procedures Act, which allows the district court to permit the government to provide substitutes in place of classified information that would otherwise be discoverable. 18 U.S.C. app. 3 § 4. The district court denied defense counsel's request to participate in this hearing. After the trial ended, the defendants argued that the district court did not have the authority to hold the hearing and moved to have the records of the hearing unsealed. The district court denied this motion.

Before trial, the defendants requested a change of venue. The district court denied this request.

Before, during, and after the trial, the defendants challenged the fairness of the proceedings and sought new trials. They argued that, because of the pervasiveness of anti-Castro sentiment in the area, it was impossible for the defendants to receive a fair trial in Miami-Dade County. The defendants argued that the fairness of the trial was further undermined by prosecutorial misconduct that occurred during the trial and by statements made by Jose Basulto, a defense witness, which we describe below.

During the jury selection process, the government used nine of its eleven peremptory challenges. The defendants objected to seven of these challenges and argued that the government excluded the jurors because they were black. The district court asked the government to provide a race-neutral reason for each challenged strike, and the court found that the reasons proffered by the government were race neutral. The jury that was seated included three black jurors and one black alternate juror.

After the government closed its case, Hernandez moved to dismiss the murder conspiracy count. He argued that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, deprived the court of jurisdiction. The district court disagreed and denied the motion.

### *C. Trial and Closing Arguments*

The defendants were charged in a 26-count indictment. They were convicted after a jury trial that lasted more than six months. We described the details of the indictment and the trial in our en banc opinion. *Campa*, 459 F.3d at 1127-42.

During the course of the trial, attorneys for the



government and witnesses made several statements that the defendants allege were improper. In response to our request at oral argument, defense counsel filed a chart that listed each instance of alleged misconduct, whether an objection was raised, and the response by the court. The chart includes several allegations that were not raised in the initial briefs of the defendants, but any issues arising out of these allegations were abandoned. See *United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir.2005) (“[P]arties cannot properly raise new issues at supplemental briefing....” (quoting *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir.2000))). Because we address the allegations of misconduct that the defendants raised in their initial briefs, we describe those facts that give rise to these allegations.

The government on several occasions asked questions of witnesses and otherwise referred to the presence of military facilities in Fayetteville, North Carolina, where Campa once lived. The district court instructed the government to avoid this line of questioning because the government had presented no evidence that connected Campa to those facilities. After counsel for the government persisted with this line of comments and questions and defense counsel objected, the court instructed the jury that the suggestion “that Mr. Campa’s presence in North Carolina was related to a military installation” was “improper” and “to completely disregard” it. The government again connected Campa with military bases in Fayetteville in its closing argument, but the district court sustained Campa’s objection to the remarks by the government.

We described in our en banc opinion as follows

an instance of misconduct by a witness, Jose Basulto:

During the defendants' case, Hernandez called as a hostile witness Jose Basulto, founder of Brothers to the Rescue and the pilot of the only plane that escaped the February 24, 1996, shutdown. After a series of questions about Basulto's travel outside of the United States, in which Hernandez's counsel suggested that Basulto had attempted to smuggle weapons into Cuba, Basulto retorted, "Are you doing the work of the intelligence government of Cuba [?]"... The court struck Basulto's remark, admonished him, and instructed the jury to disregard the comment, noting that the remark was "inappropriate and unfounded" and that Hernandez's counsel was properly providing a "vigorous defense for his client."

*Campa*, 459 F.3d at 1138 (footnotes omitted) (alteration in original).

During closing arguments, the government uttered several statements that the defendants now challenge. In reference to the shutdown, the government said, "What kind of justification is that to shoot people out, or in [defense attorney] Mr. McKenna's word, the final solution, I heard that word before in the history of mankind." In his closing argument, Mr. McKenna had stated that "finally, somebody in a command bunker was given authority to exercise the final option and the final option was exercised," but there was no reference to the "final solution" in Mr. McKenna's closing argument. The government said that the Cuban Directorate of Intelligence sponsored "book bombs," "threats," and "sabotage," and that they used the identities of "dead



babies” to construct false identification documents. The government argued, “My God, these guys are spies” “bent on the destruction of the United States of America” and said that Campa was sent “to destroy the United States.” The government also said that the date of the shutdown, “February 24, 1996[,] like December 7, 1941[,] is a day that will live in the hearts and minds of these families, these four families forever destroyed.” The defendants did not object to any of these statements in closing arguments.

After defense counsel mentioned in closing argument that counsel was appointed and said that “[w]e are working and serving the [C]onstitution of the United States,” the government said that the defendants “forced us to prove their guilt beyond a reasonable doubt” and that the defendants who were “bent on destroying the United States” received “able counsel who argued every point and cross-examined our witnesses,” “paid for by the American taxpayer.” The defendants objected to these arguments. Campa also objected to the statement that the court “takes into account all other factors that may be relevant for what would be the appropriate sentence,” which the government made in closing argument after Campa’s attorney said that Campa is “looking at ten years in prison.” The district court sustained all these objections.

#### *D. Convictions and Sentences*

After the trial, Hernandez was convicted of 13 counts: one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c); eight counts of acting as an agent of a foreign government without notifying the Attorney General,

18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; two counts of fraud and misuse of documents, 18 U.S.C. § 1546(a); one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3); and one count of conspiracy to murder, 18 U.S.C. § 1117. Hernandez was sentenced to concurrent terms of life imprisonment on the counts of conspiracy to murder and conspiracy to gather and transmit national-defense information. On the other counts, Hernandez was sentenced to shorter terms of imprisonment, which run concurrently with one another and with his life sentences.

Campa was convicted of five counts: two counts of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; one count of fraud and misuse of documents, 18 U.S.C. § 1546(a); and one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). He was sentenced to a total of 228 months of imprisonment.

Medina was convicted of ten counts: four counts of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c); two counts of fraud and misuse of documents, 18 U.S.C. § 1546(a); one count of making a false statement in a passport application, 18 U.S.C. § 1542; and one count of possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). Medina was sentenced to life imprisonment on the

conspiracy charge. On the other charges he was sentenced to shorter terms of imprisonment that run concurrently with his life sentence.

Rene Gonzalez was convicted of two counts: one count of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371. He was sentenced to five years of imprisonment on the conspiracy count and a consecutive term of ten years of imprisonment on the substantive count.

Antonio Guerrero was convicted of three counts: one count of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and one count of conspiracy to do so, 18 U.S.C. § 371; and one count of conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c). Guerrero was sentenced to life imprisonment for conspiracy to gather and transmit national-defense information, 18 U.S.C. § 794(c). For each of the other counts, Guerrero was sentenced to shorter terms of imprisonment, which run concurrently with Guerrero's life sentence.

## II. STANDARDS OF REVIEW

The multiple issues in this appeal are governed by several standards of review. We review the denial of a motion to suppress evidence obtained under the Foreign Intelligence Surveillance Act *de novo*, see *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir.2000), but our scope of review is no greater than that of the court that approved the searches and surveillance, *United States v. Badia*, 827 F.2d 1458, 1463 (11th Cir.1987). We review *de novo* the interpretation of the Classified Information

Procedures Act, *see United States v. Gilbert*, 130 F.3d 1458, 1461 (11th Cir.1997), but we review discovery rulings for abuse of discretion, *see United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir.1997).

We review the denial of a motion for a mistrial based on improper testimony for abuse of discretion. *United States v. Mendez*, 117 F.3d 480, 484 (11th Cir.1997). Allegations of prosecutorial misconduct present mixed questions of law and fact that we review *de novo*. *United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir.1997). We review jury selection under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *de novo*, but we review underlying factual findings for clear error. *United States v. Allen-Brown*, 243 F.3d 1293, 1296-97 (11th Cir.2001). We review a determination whether participation by a foreign state in litigation is so extensive as to waive a defense of sovereign immunity for abuse of discretion. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 278 (2d Cir.1984); Restatement (Third) of Foreign Relations Law § 456 reporters' note 4 (1987).

We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the party who objects to them. *United States v. Grigsby*, 111 F.3d 806, 814 (11th Cir.1997). If the instructions accurately reflect the law, the district court enjoys "wide discretion as to the style and wording employed in its instruction [s]." *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir.2003). We review the sufficiency of the evidence *de novo* and view the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in favor of the government to

determine whether a reasonable jury could convict. *United States v. Khanani*, 502 F.3d 1281, 1293 (11th Cir.2007); *United States v. Keller*, 916 F.2d 628, 632 (11th Cir.1990). We review the application of the Sentencing Guidelines *de novo*, but we review the factual determinations of the district court for clear error. *United States v. Bradford*, 277 F.3d 1311, 1316 (11th Cir.2002).

### III. DISCUSSION

The defendants present several arguments about the procedural rulings made by the district court and the jury instructions, and each defendant challenges the sufficiency of the evidence in support of his convictions and his sentence. We first discuss the five procedural issues: (1) whether the district court erred when it denied the defendants' motion to suppress under the Foreign Intelligence Surveillance Act; (2) whether the district court erred about the discovery of classified information; (3) whether the district court was required to grant a new trial or declare a mistrial based on alleged prosecutorial and witness misconduct; (4) whether the government exercised its peremptory challenges to prospective jurors on the basis of race; and (5) whether the Foreign Sovereign Immunities Act deprived the court of jurisdiction of the charges against Hernandez. We then turn to the three issues about the jury instructions: (1) whether the district court instructed the jury erroneously about the offense of acting as a foreign agent without notifying the Attorney General; (2) whether the district court erred when it declined to instruct the jury on the defense of necessity; and (3) whether the district court instructed the jury erroneously about Hernandez's murder-conspiracy charge. We then



address the sufficiency of the evidence in support of each defendant's conviction. Finally, we address whether the district court correctly sentenced each defendant.

*A. The District Court Did Not Err When It Denied the Defendants' Motion to Suppress.*

Hernandez, Medina, Campa, and Guerrero argue that the district court erred by denying their motion to suppress evidence obtained from searches and surveillance conducted under the Foreign Intelligence Surveillance Act. 50 U.S.C. §§ 1801-1845 (2000). Although the defendants concede that they do not know why the searches and surveillance were approved by officials in the executive branch and the FISA Court, whether the district court determined that the searches and surveillance were for proper purposes, or whether the minimization procedures of the Act were met, the defendants argue that the searches did not comply with the Act. Because only Campa challenged this evidence in the district court, we review the arguments of his codefendants for plain error. See *United States v. Gray*, 626 F.2d 494, 501 (5th Cir.1980). In 2001, after the searches were approved, Congress amended the Act and relaxed some of its standards, but we assume that the more stringent standards imposed by the earlier version of the Act governed the applications in this appeal. See *United States v. Hammoud*, 381 F.3d 316, 333 n. 6 (en banc) (4th Cir.2004), *vacated and remanded*, 543 U.S. 1097, 125 S.Ct. 1051, 160 L.Ed.2d 997, *opinion reinstated in part*, 405 F.3d 1034 (4th Cir.2005). No plain or other error occurred.

The district court must grant a motion to suppress the fruits of a search or surveillance if it

determines that the search or surveillance "was not lawfully authorized or conducted." 50 U.S.C. §§ 1806(g), 1825(h) (2000). An application for a search or surveillance under the Act must contain certifications by a designated official of the executive branch, such as the Director of the Federal Bureau of Investigation, that the information sought is foreign-intelligence information, 50 U.S.C. §§ 1804(a)(7)(A), 1823(a)(7)(A); the purpose of the searches and surveillance is "to obtain foreign intelligence information," 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B); and the information sought cannot "reasonably be obtained by normal investigative techniques," 50 U.S.C. §§ 1804(a)(7)(C), 1823(a)(7)(C). The certification also must designate the "type of foreign intelligence information being sought," 50 U.S.C. §§ 1804(a)(7)(D), 1823(a)(7)(D); and include a statement that describes the basis for the certifications that the information sought is the type designated and that the information could not reasonably be obtained by normal investigative techniques, 50 U.S.C. §§ 1804(a)(7)(E), 1823(a)(7)(E).

When, as here, the applications contain the required certifications, they are subject "only to minimal scrutiny by the courts." *Badia*, 827 F.2d at 1463; *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir.1984). The reviewing court has no greater authority to review the certifications of the executive branch than the FISA court has. *Badia*, 827 F.2d at 1463. We have explained that, in the absence of a *prima facie* showing of a fraudulent statement by the certifying officer, procedural regularity is the only determination to be made if a non-United States person is the target. *Id.* (quoting H.R.Rep. No. 95-



1283, pt. 1, at 92-93 (1978)). The defendants have not identified a fraudulent statement, but at least one of the targets of the searches and surveillance, Guerrero, is a "United States person" because he is a citizen, 50 U.S.C. § 1801(i).

Because a United States person was a target, we must determine whether at least some of the certifications in the application are clearly erroneous. When we make this determination we review the statement contained in the application of the basis for the certifications and any other information furnished in connection with the application. 50 U.S.C. § 1824(a)(5). Our independent review of all the applications satisfies us that the certifications were not clearly erroneous, so we need not decide whether the other defendants are United States persons or whether the clearly erroneous standard of review applies to them.

The defendants argue that the searches were conducted for purposes not allowed under the Act, but we disagree. A designated executive official certified that the purpose of each search and surveillance was "to obtain foreign intelligence information," 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B). We have reviewed the information contained in the applications and conclude that each certification is not clearly erroneous.

The defendants next argue that, with respect to surveillance, the government "may have" violated the procedures that FISA requires to minimize the "acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." See 50 U.S.C. §§ 1801(h), 1804(a)(5), 1823(a)(5). The

defendants base this argument on a factual finding by another court in an unrelated case, which in turn was based on concessions made by the government that it had erred in several applications and had violated its own rules about information sharing. See *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611, 620-21 (FISA Ct.), *rev'd on other grounds*, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev.2002). These findings tell us nothing about the searches or surveillance at issue in this appeal, and they do "not establish that the government failed to appropriately minimize surveillance." *Hammoud*, 381 F.3d at 334.

Finally, Campa argues that the evidence against him must be suppressed because the government did not know of his existence or identity when it submitted applications under the Act. This argument fails. The applications named other defendants as targets, and, as the Court of Appeals for the Second Circuit has explained, when "the proper preconditions are established with respect to a particular target, there is no requirement in FISA that all those likely to be overheard engaging in foreign intelligence conversations be named." *Duggan*, 743 F.2d at 79.

*B. The District Court Did Not Err In Its Rulings About the Discovery of Classified Information.*

Hernandez, Medina, Campa, and Guerrero challenge the manner in which the district court managed the discovery of classified information by the defense. They present three arguments: (1) the district court should not have held an *ex parte* hearing under section four of the Classified Information Procedures Act, 18 U.S.C. app. § 4; (2)

the court should have unsealed the records of that hearing after the trial; and (3) the government used the Act to violate its discovery obligations under Federal Rule of Criminal Procedure 16. These arguments fail. We address each argument in turn.

The district court did not err when it held an ex parte hearing under section four of the Act. Although it does not expressly provide for a hearing, section four "contemplates an application of the general law of discovery in criminal cases to the classified information area," *United States v. Yunis*, 867 F.2d 617, 621 (D.C.Cir.1989). The broad authority of the district court to regulate discovery includes the power to hold hearings. See, e.g., Fed.R.Crim.P. 16(d); 2 Charles Alan Wright, *Federal Practice and Procedure* § 258 (3d ed.2000). Nothing in section four circumscribes this power. As the Ninth Circuit has explained, "a hearing is appropriate if the court has questions about the confidential nature of the information or its relevancy." *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir.1998). The district court did not abuse its discretion when it held a hearing.

The district court also did not err by holding the hearing ex parte. Section four, which concerns only "[d]iscovery of classified information by defendants," 18 U.S.C. app. 3 § 4, expressly calls for an "ex parte showing." "[W]hile these statutes specify written submissions, they do not rule out hearings in which government counsel participate." *Klimavicius-Viloria*, 144 F.3d at 1261. When the discovery obligations of the government would otherwise require it to disclose documents that contain

classified information, section four allows the district court to permit the government either to redact the classified information or to substitute a summary or a statement of factual admissions in place of the classified documents. 18 U.S.C. app. 3 § 4. If the government provides adequate redacted documents or substitutions and obtains the permission of the district court, section four gives the government the right to keep defense counsel from seeing the original documents. The right that section four confers on the government would be illusory if defense counsel were allowed to participate in section four proceedings because defense counsel would be able to see the information that the government asks the district court to keep from defense counsel's view. *See United States v. Mejia*, 448 F.3d 436, 457-58 (D.C.Cir.2006); H.R.Rep. No. 96-831, pt. 1, at 27 n.22 (1980) ("[S]ince the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.").

The defendants argue that the ex parte hearing prejudiced them and violated their due-process rights, but we disagree. Ordinarily, the government alone determines whether material in its possession must be turned over to a defendant. When the defendant requests exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), for example, "the government decides which information must be disclosed." *United States v. Jordan*, 316 F.3d 1215, 1252 n. 81 (11th Cir.2003) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987)). "Unless the defense counsel becomes aware

that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Id.* (quoting *Ritchie*, 480 U.S. at 59, 107 S.Ct. at 1002) (internal quotation marks omitted). In contrast with this ordinary rule of unreviewability, neither the decision of the prosecutor nor the decision of the district court, under section four, is final. Any information that the government withholds under section four must be replaced with redacted documents or substitutes. A defendant can examine these redacted documents and substitutes and, if he believes that they are inadequate, move for an order compelling discovery. Fed R.Crim. P. 16(d). The defendants do not argue that this remedy was either inadequate or unavailable to them. We conclude that the district court did not abuse its discretion by holding an ex parte hearing.

The defendants next argue that the district court erred when it declined to unseal the records of its ex parte hearing after the trial, but again we disagree. Section four requires the statement of the government to be "sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal." 18 U.S.C. app. 3 § 4. The statute has no provision for the unsealing of this statement or other sealed records. The right of the government to keep some classified information from defense counsel would be ineffective if, after the trial, the government had to expose the very information that a court ruled the government had a right to keep secret before the trial. The district court did not err when it declined to unseal the records.



Finally, the defendants argue that the government used the Act to violate its discovery obligations under Federal Rule of Criminal Procedure 16 by withholding classified documents and tangible items that were seized from the defendants. This argument also fails. The defendants' bare assertion that they did not receive unspecified information does not establish a discovery violation. *See Jordan*, 316 F.3d at 1250. The defendants are entitled to discovery of these items upon a motion under Federal Rule of Criminal Procedure 16(a)(1)(E), *see Id.*, and if the government has not provided adequate substitutes under section four of the Act. The defendants do not argue either that they filed a motion under Rule 16(a)(1)(E) or that the government failed to provide adequate substitutes under section four, and they do not identify any error in a discovery ruling by the district court. If the government was required to disclose more about the information seized from the defendants, then the defendants who earlier possessed that information should have been able to explain to the district court why the disclosure was inadequate. Without more, we cannot say that the government violated its discovery obligations.

*C. The District Court Did Not Err When It Declined to Order a New Trial or a Mistrial.*

Hernandez, Medina, Campa, and Guerrero challenge statements made by a witness and by the government during the trial and statements of the government during closing arguments. The defendants argue that the statements improperly appealed to "the fears and passions of the jury" and require a new trial. We disagree.

The parties dispute whether we resolved this

issue in our en banc decision, when we affirmed the denial of the defendants' motions for new trials under Federal Rule of Criminal Procedure 33. *Campa*, 459 F.3d at 1153. In its order denying the motions, the district court addressed two separate arguments: (1) that the venue was prejudicial; and (2) that the government engaged in prejudicial misconduct. The district court addressed the statements of the government during trial and closing argument that connected Campa with military bases in North Carolina and other closing arguments by the government that the defendants contend were improper. The district court found no prejudicial misconduct, and we affirmed.

The decision of the en banc Court resolved these issues of prosecutorial misconduct. We explained that "the prosecution's closing arguments did not prejudice the defendants because the court granted the defendants' objections and specifically instructed the jury to disregard the improper statements. These alleged incidents of government misconduct 'were so minor that they could not possibly have affected the outcome of the trial.'" *Id.* (quoting *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985)). Because our en banc Court expressly decided this issue, we will not reconsider it. See *Hester v. Int'l Union of Operating Eng'rs*, 941 F.2d 1574, 1581 n. 9 (11th Cir.1991).

Our en banc decision also resolved any issue of witness misconduct by Jose Basulto. The misconduct of a witness does not require the district court to "vitiate the trial" in the absence of prejudice, *Spach v. Monarch Ins. Co. of Ohio*, 309 F.2d 949, 953 (5th Cir.1962); see also 66 C.J.S. *New Trial* § 29, at 113



(1998) (“[V]olunteered statements by a witness, *where prejudicial*, may under the circumstances warrant a new trial.” (emphasis added)), and no prejudice occurred here. We explained in our en banc decision, “Basulto’s comment that Hernandez’s counsel was a spy for Cuba did not prejudice the defendants because it was merely a single remark during a seven-month trial by the defense’s own witness, which the court struck and instructed the jury to disregard.” *Campa*, 459 F.3d at 1153.

Hernandez argues that the closing argument by the government prejudicially misstated its burden of proof for the count of murder conspiracy. Contrary to the argument of the government, we did not address this prosecutorial-misconduct argument in our en banc decision. *Id.* at 1126 n. 1. We address it now and conclude that it fails.

During closing argument, the government said that an element of the murder-conspiracy charge “requires the proof of the crime occurring in international airspace” and that the government “has proven that the shutdown occurred in international air space.” The government also said, “[T]he United States must prove there was a conspiracy to kill[,] and we have proven the conspiracy to kill.” Hernandez objected to each of these statements, and the district court sustained each objection but declined to grant Hernandez’s motions for judgment of acquittal and a new trial. The district court did not err.

We subject allegations of prosecutorial misconduct to a “two-part test.” *United States v. Obregon*, 893 F.2d 1307, 1310 (11th Cir.1990). We “assess (1) whether the challenged comments were

improper and (2) if so, whether they prejudicially affected the substantial rights of the defendant.” *United States v. Castro*, 89 F.3d 1443, 1450 (11th Cir.1996) (citing *Obregon*, 893 F.2d at 1310). The statements by the government were neither improper nor prejudicial. The jury instructions required proof of one of the overt acts included in the indictment, and one of the overt acts alleged was the killing of individuals in the special maritime and territorial jurisdiction of the United States. The statements by the government were accurate and did not misstate the burden borne by the government.

*D. The Government Did Not Engage in Racial  
Discrimination in Its Exercise of Peremptory  
Challenges.*

The defendants argue that the government violated the Constitution by engaging in a “systematic pattern of striking black jurors.” We disagree. The district court did not err when it found that the peremptory strikes by the government were not discriminatory.

“Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges ‘for any reason at all, as long as that reason is related to his view concerning the outcome’ of the case to be tried, [the Constitution] forbids the prosecutor to challenge potential jurors solely on account of their race....” *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719 (quoting *United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn.1976)). The procedure for evaluating an objection to a peremptory challenge involves three steps: “(1) the objector must make a *prima facie*

showing that the peremptory challenge is exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination.” *Allen-Brown*, 243 F.3d at 1297.

In response to the defendants’ challenges, the district court required the government to give race-neutral explanations for its peremptory challenges. We understand the district court to have ruled implicitly that the defendants had made a prima facie showing of racial discrimination because “a district court cannot ignore the prima facie showing requirement.” *Id.* at 1297. The government stated the reasons for each challenged strike, and the district court found that the proffered reasons were race neutral.

We may affirm the decision of the district court on any ground that finds support in the record, *United States v. Simmons*, 368 F.3d 1335, 1342 (11th Cir.2004), and we conclude that the defendants did not establish a prima facie case of discrimination. Our well-established precedent, *United States v. Dennis*, 804 F.2d 1208 (11th Cir.1986), controls this issue. In *Dennis*, the government exercised some of its peremptory challenges to remove black venire members; it did not use all of its peremptory challenges; and the jury that was seated included two black persons. *Id.* at 1209, 1211. We concluded, as a matter of law, that there had been no *Batson* violation:

It is thus obvious that the government did not attempt to exclude all blacks, or as many

blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors or alternates.

*Id.* at 1211.

As occurred in *Dennis*, the government did not attempt to exclude as many black persons as it could from the jury. The government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror. No *Batson* violation occurred.

*E. The District Court Did Not Err in Its Instruction of the Jury.*

The defendants argue that the district court erred in three of its jury instructions: (1) the instruction about acting as a foreign agent without notifying the Attorney General; (2) the instruction about the offense of conspiracy to murder; and (3) the instruction about the defense of necessity. Each argument fails. We address each argument in turn.

1. Acting as a Foreign Agent Without Notifying the Attorney General

Hernandez, Medina, Campa, Gonzalez, and Guerrero argue that the district court erroneously instructed the jury about the elements of the offense of acting as a foreign agent without notifying the Attorney General. 18 U.S.C. § 951. The defendants argue that the statute requires the government to prove that the defendants knew that they were

required to register with the Attorney General and that the district court erred when it declined to instruct the jury on this requirement. We disagree.

The language of the statute is silent about mens rea:

Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 951(a). The accompanying regulations, promulgated under subsection (b), explain who is required to notify the Attorney General and describe the procedures for notification. See 28 C.F.R. §§ 73.1-.6. These regulations are also silent about mens rea.

The silence of the statute is dispositive: “Where no specific intent element is apparent on the face of the statute, the crime is one of general intent.” *United States v. Ettinger*, 344 F.3d 1149, 1158 (11th Cir.2003). “[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes.” *United States v. Phillips*, 19 F.3d 1565, 1576-77 (11th Cir.1994). We join the Seventh Circuit and hold that section 951 does not require proof that the defendant knew of the requirement to register. See *United States v. Dumeisi*, 424 F.3d 566, 581 (7th Cir.2005) (“Knowledge of the requirement to register is not an element of § 951.”).

The defendants cite several decisions in support of their argument that the government must prove a

heightened mens rea under section 951. These decisions are inapposite because they interpret statutory language that expressly requires a heightened mens rea. See *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir.1989) ("willfully"); *United States v. Frade*, 709 F.2d 1387, 1391-92 (11th Cir.1983) ("willfully"); *United States v. Hernandez*, 662 F.2d 289, 291-92 (5th Cir. Oct.1981) ("willfully"); *United States v. Warren*, 612 F.2d 887, 890 (5th Cir.1980) ("knowingly" and "willfully"). This language is absent from section 951.

The defendants' argument that general principles of criminal law and the doctrine of constitutional doubt require a mens rea of specific intent for section 951(a) also fails. The government was required to prove a mens rea of general intent. The district court instructed the jury that the defendants must have acted "knowingly," and that they must have known "that [they] had not provided prior notification to the Attorney General," to be found guilty under section 951. The defendants' request for an instruction that requires the government to prove that the defendants knew that they were required to register is not an argument for a mens rea requirement but an argument for a heightened mens rea requirement. A heightened requirement has no basis in the statutory language and would be contrary to the ordinary rule, "deeply rooted in the American legal system," *Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991), that ignorance of the law is no defense to a criminal prosecution. The district court did not err when it declined to require proof of more than general intent. See *United States v.*



*Knight*, 490 F.3d 1268, 1271 (11th Cir.2007) (a general intent requirement is “sufficient to separate proper conduct from improper actions”).

## 2. Conspiracy to Murder

Hernandez argues that the jury instructions allowed the jury to convict him on a finding of fewer elements than required for the charge of conspiracy to murder, but we disagree. The district court gave the instruction that the defense requested during the charge conference. “It is well established in this Circuit that to invite error is to preclude review of that error on appeal.” *United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir.2005).

Hernandez attempts to evade the invited error doctrine by arguing that other instructions that were given about International Civil Aviation Organization guidelines and arguments that the government made in closing argument somehow lowered the government’s burden. This argument fails. Nothing that Hernandez identifies in other instructions or in closing argument suggests that the government bore a burden lower than the burden stated in the murder-conspiracy instruction that the defendants requested.

## 3. Necessity

Guerrero argues that the district court erred when it declined to instruct the jury on the defense of necessity. We disagree. Guerrero did not establish that he was entitled to that instruction.

Guerrero argues that his illegal actions and those of his codefendants were necessary as “a last-resort means of impeding continuing actions and threats-by virulently anti-Castro Cuban-exile groups



in south Florida-that had terrorized Cuba.” We have explained that a defendant has the burden of establishing his entitlement to an instruction on his theory of defense “separate and apart from instructions given on the elements of the charged offense.” *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir.1995). This burden is low. “[A] defendant is entitled to have the court instruct the jury on his theory of the case, ‘as long as it has some basis in the evidence and has legal support.’” *United States v. Presley*, 487 F.3d 1346, 1350 (11th Cir.2007) (quoting *United States v. Nolan*, 223 F.3d 1311, 1314 (11th Cir.2000) (per curiam)).

Guerrero has identified no basis in the evidence for a necessity instruction. A defense of necessity requires some evidence that the threat of harm that makes the criminal activity necessary was “unlawful ... present, imminent, and impending,” and that “there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.” *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir.2000). Even if we accept Guerrero’s interpretation of the facts on appeal, he has not established that the Cuban exile groups posed any imminent threat, nor has he established any causal relation between the conduct that gave rise to his convictions-espionage against the military of the United States-and the avoidance of any harmful activities of Cuban exile groups.

*F. Hernandez Waived Any Defense Under the  
Foreign Sovereign Immunities Act.*

Hernandez argues that the court did not have jurisdiction over the criminal action against him because he is entitled to sovereign immunity under

the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. The Supreme Court has stated that the Act governs "claims of immunity in every civil action" against foreign states. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488, 103 S.Ct. 1962, 1968, 76 L.Ed.2d 81 (1983). We have stated in dicta that the Act does not address "foreign sovereign immunity in the criminal context," *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir.1997), but some of our sister circuits disagree about whether the Act affects the jurisdiction of federal courts in criminal actions. Compare *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 820 (6th Cir.2002) ("[T]he FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."), with *Southway v. Cent. Bank of Nig.*, 198 F.3d 1210, 1214 (10th Cir.1999) ("If Congress intended defendants ... to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state."). We need not address the availability of sovereign immunity as a defense, under the Act, to the criminal jurisdiction of federal courts if we conclude that Hernandez waived any sovereign immunity.

A foreign state (or its agent or instrumentality) may waive its sovereign "immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). "[A]n appearance ... in an action, without challenge to the jurisdiction of the court, is a waiver of immunity from jurisdiction to adjudicate that action." Restatement (Third) of Foreign Relations Law § 456(2)(c) & cmt. b (1987). This principle applies whether the party asserts immunity from criminal or civil jurisdiction. *Id.* § 421(3) & cmt. b.

Hernandez waived any defense of sovereign immunity. Hernandez first appeared before the district court on September 14, 1998, but first raised the defense of sovereign immunity more than two years later at the close of the evidence presented by the government. During this interim, Hernandez appeared before the court on numerous occasions, filed several motions, which included motions to dismiss on other grounds, responded to motions by the government, agreed to a trial date, and appeared at trial. Hernandez's long and active participation in the action waived any defense of sovereign immunity. *See Id.* § 456 reporters' note 4. We recognize that district courts ordinarily "have discretion ... to determine when the participation of a party in ... litigation is so extensive as to constitute a waiver," *Id.*; *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 278 (2d Cir.1984), but Hernandez's participation was so extensive by the time he first raised the defense that we conclude as a matter of law that he waived any defense, *see Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 46-47, 36 S.Ct. 476, 477, 60 L.Ed. 879 (1916) (holding that a defendant who appeared, filed answers to an original and several amended complaints, set a trial date, and first raised the defense of sovereign immunity eight months after the action began waived the defense). We do not decide whether the defense would have been available to Hernandez if it had been timely raised. *See Id.*

*G. Sufficient Evidence Supports the Convictions  
of Each Defendant.*

Gonzalez, Campa, Hernandez, Medina, and Guerrero each argue that the evidence at trial was

insufficient to support their respective convictions. We disagree. We address the arguments of each defendant in turn.

1. Sufficient Evidence Supports Gonzalez's  
Convictions.

Gonzalez argues that the evidence introduced at trial was insufficient to convict him of acting as an agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and conspiracy to violate section 951 and to defraud the United States, 18 U.S.C. § 371. We disagree. Sufficient evidence supports each conviction.

Gonzalez concedes that evidence presented at trial established that he and his codefendants acted as "emissaries of the Government of Cuba," but he argues that the evidence is insufficient to establish that he violated section 951(a) and that he conspired to do so because the evidence implies that Gonzalez "was never instructed as to the reporting requirements." Gonzalez's argument is based on a misunderstanding of the law. As we have previously explained, section 951 establishes a general intent crime, so the government was required to prove the intent only to do the acts that the law proscribes. *Phillips*, 19 F.3d at 1576. The government was not required to prove that Gonzalez knew of the registration requirement, so Gonzalez's argument fails.

Gonzalez's argument that the evidence introduced at trial was insufficient to prove three of the overt acts alleged in the indictment also fails. To sustain a conviction for conspiracy, "the Government must prove the existence of an agreement to achieve

an unlawful objective, the defendant's knowing and voluntary participation in the conspiracy, and the commission of an overt act in furtherance of it." *United States v. Suba*, 132 F.3d 662, 672 (11th Cir.1998). The government does not need to prove that the defendants accomplished the purpose of the conspiracy. "The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy." *Iannelli v. United States*, 420 U.S. 770, 786 n. 17, 95 S.Ct. 1284, 1293 n. 17, 43 L.Ed.2d 616 (1975). "While it is error to submit to the jury an overt act as to which there is a total lack of proof, questions of whether or not a proven overt act is in furtherance of the conspiracy are ordinarily for the jury to decide." *United States v. Fontenot*, 483 F.2d 315, 322 (5th Cir.1973) (citations omitted). The government presented sufficient evidence to establish that the overt acts that Gonzalez challenges furthered the conspiracy. We address each challenged act in turn.

The twelfth overt act alleged in the indictment charges that Gonzalez provided Hernandez with a report about a letter that Gonzalez solicited from a "United States Congressional Representative" seeking the admission of Gonzalez's wife into the United States. Gonzalez argues that the evidence introduced in support of this overt act does not prove that Gonzalez's efforts were "tantamount to the interference with any governmental function." Gonzalez's argument misunderstands the law.

The purpose of the conspiracy, as alleged in the indictment, included "sowing disinformation ... in dealings with United States private and public

institutions." The report that Gonzalez sent to Hernandez described his efforts to secure his wife's entry into the United States and explained that Gonzalez's efforts were "designed more to give an appearance, rather than to seek action to have my family leave." A reasonable jury could have found that this report furthered the conspiracy by keeping other members of the conspiracy informed about Gonzalez's efforts. Whether this report actually interfered with any governmental function is irrelevant.

The fifteenth overt act alleged in the indictment, which Gonzalez also challenges, charges that Gonzalez "met with the FBI in the guise of a cooperating individual." Gonzalez concedes that evidence established that he met with the FBI, and the government introduced communications from Cuba that directed Gonzalez to meet with FBI agents and specifically instructed him how to act during the meetings. The government also introduced reports from Gonzalez to Hernandez that described Gonzalez's meetings with the FBI and opined that Gonzalez's performance was convincing. A reasonable jury could have found based on this evidence that the overt act furthered the conspiracy.

Gonzalez's challenge to the twentieth overt act alleged in the indictment, which charges that Gonzalez reported to Hernandez that "Gonzalez had been flying close to Homestead Air Base with the aim of observing any strange movement," also fails. The government introduced a report in which Gonzalez wrote to Hernandez, "As you told me to do, I have been flying in the vicinity of Homestead Air Base in order to be able to observe any strange movement,"



and described Gonzalez's observations of aircraft, their movement, and their positioning. The report supports the finding that this overt act furthered the conspiracy.

## 2. Sufficient Evidence Supports Campa's Convictions.

Campa presents two arguments that the evidence introduced at trial was insufficient to convict him, but both fail. Campa first adopts the arguments of Gonzalez with respect to his convictions for acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so. For the reasons we have previously explained, these arguments fail. Campa next argues that the government failed to offer sufficient evidence to support his remaining convictions for fraud and misuse of documents, 18 U.S.C. § 1546(a), and possession with intent to use five or more fraudulent identification documents, 18 U.S.C. § 1028(a)(3). These convictions are based on an allegation that Campa possessed a fraudulent passport. Campa argues that there is insufficient evidence that he possessed this passport, but we disagree.

Two counts of the indictment charged that Campa knowingly possessed a passport that bore Campa's likeness along with the name of someone else. We have explained that "[t]he government need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence. Constructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise



dominion or control." *United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir.2006) (citation omitted).

The government introduced into evidence a document that appears to be a standard United States passport. The document bears Campa's photograph and the name and signature of "Osvaldo Reina." A government expert testified that the document was a counterfeit passport. An agent of the Federal Bureau of Investigation, who was present when the counterfeit passport was seized, testified that the counterfeit passport was found along with a social security card, a Florida driver's license, business cards for an agent of a Spanish book publishing company, and a membership card for a Florida club, all bearing the name of Reina. Some of these other documents also bear Campa's photograph. These items were found hidden inside a concealment device in a notebook that was found in a dresser in Hernandez's apartment.

The government also introduced into evidence an encrypted report found in Campa's residence of "work directives," which contains descriptions of primary, "intermediate," and "reserve" legends. The primary legend is in the name of Ruben Campa and contains biographical data associated with that name. The reserve legend is in the name of Osvaldo Reina and includes the biographical data that appears on the counterfeit passport. The government also introduced an "escape plan," found at Campa's residence, which instructs Campa to "change identity, assuming the one in your reserve documentation" in the event of a situation that "might demand an emergency exit from the country."

From this evidence a reasonable jury could have

found that Campa had the power and intent to exercise dominion or control over the counterfeit passport. Campa's argument that "the government proceeded simply on the legally unsustainable theory of possession due to past temporary stay in another's premises" fails. Although mere presence in an area where an item is found is insufficient to support a conviction based on possession of that item, *United States v. Rackley*, 742 F.2d 1266, 1271 (11th Cir.1984), the government introduced evidence of much more than presence. A reasonable jury could have inferred from the appearance of Campa's photograph on the passport and accompanying identity documents in the context of the other evidence that Campa was aware of the documents and that they were created for his use. A reasonable jury could have inferred from the instructions that Campa possessed, which contained the Ruben Campa legend that Campa used regularly in addition to the Reina legend, that Campa intended to use the Reina legend if an "emergency exit" became necessary. A reasonable jury could have inferred from Campa's stay at Hernandez's apartment (which Campa concedes) that Campa had access to the counterfeit passport when he needed it. Sufficient evidence supports Campa's convictions.

### 3. Sufficient Evidence Supports the Convictions of Guerrero, Medina, and Hernandez.

The remaining arguments about sufficiency of the evidence pertain to the convictions of Guerrero, Medina, and Hernandez. The relevant offenses are acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so, conspiracy to transmit national-defense

information, and conspiracy to murder. These defendants were convicted of all except the last charge. Only Hernandez was convicted of that charge.

*a. Convictions for Acting as an Agent of a Foreign Government Without Notifying the Attorney General and Conspiracy to Do So*

Guererro, Medina, and Hernandez argue that the evidence introduced at trial was insufficient to convict them of acting as an agent of a foreign government without notifying the Attorney General and conspiracy to do so, but we disagree. Each defendant adopts the arguments of Gonzalez with respect to his convictions for these offenses. For the reasons we have previously explained, these arguments fail.

*b. Convictions for Conspiracy to Transmit National-Defense Information*

Guererro, Medina, and Hernandez next argue that their convictions for conspiracy to transmit national-defense information, 18 U.S.C. § 794(c), were not supported by sufficient evidence. We disagree. The government introduced sufficient evidence to support the convictions.

The indictment charges that Hernandez, Medina, and Guerrero conspired "to communicate, deliver and transmit ... to ... the Republic of Cuba ... information relating to the national defense of the United States ... intending ... that the same would be used to the injury of the United States and to the advantage of a foreign nation." The defendants concede that they conspired to transmit information to Cuba but argue that the information that they conspired to transmit

was not "information relating to the national defense" under section 794. We disagree.

The government introduced sufficient evidence to establish that the defendants conspired to transmit to Cuba "information relating to the national defense." "National defense," the Supreme Court has explained, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Gorin v. United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 434 (1941). As the government concedes, in the light of the mens rea requirement of the statute, "information relating to the national defense" under section 794 is limited to information that the government has endeavored to keep from the public. See *Id.* at 27-28, 61 S.Ct. at 434; *Squillacote*, 221 F.3d at 575-80; *United States v. Heine*, 151 F.2d 813, 816 (2d Cir.1945) (L. Hand, J.).

Joseph Santos, a codefendant of Hernandez, Medina, and Guerrero, testified that he received instructions from Medina to penetrate the facility of the Southern Command in Miami to gather information. Santos testified that there was no limitation placed on the information that he was to gather. Santos also testified that, as part of his training for penetration work, he was instructed that "the most important thing to gather" was "the type of information that is not readily available through conventional means. It is information that is classified as either restricted, classified, or secret." The government also introduced correspondence from Medina to Santos that included a chart that described the performance of Medina, Santos, and Santos's wife, Amarylis. The chart includes a blank

entry corresponding to "secret info." of a military nature. Santos testified that the entry was blank because Santos was "unable to penetrate the Southern Command."

The government also introduced evidence that Guerrero was assigned to gather intelligence from the Naval Air Station at Key West, Florida. Guerrero discovered that a command post building at the station was being remodeled for use that involves "top secret activities." The Chief of Naval Operations at the Pentagon testified that the ability to store classified documents at the Key West facility is not made known to the general public.

Correspondence from a Cuban military specialist directed Hernandez, among other things, to instruct Guerrero to obtain "anything else that you can get related to the use of that building." In a communication to Hernandez, Guerrero described the security features of the structure. A construction manager at the Department of Defense testified that many of these security features did not appear on the publicly available floor plan.

The government also introduced correspondence from Medina to Guerrero that includes a chart similar to the chart that summarized Santos's performance. The chart includes a tally of both military and other "secret info." and "public info." The tally includes a positive numeric score for secret military information.

The government also introduced a report from Guerrero to Medina that describes the radio frequency settings that Guerrero observed while he was working on a repair job in the "greenhouse"-an



alternate air control tower-at the Key West station. The Chief of Naval Operations at the Pentagon testified that, although the main frequencies that the Navy uses to control civilian and military aircraft are published, Guerrero's report included frequencies that are not published. The naval officer testified that these frequencies are not published because they are used when the Navy does not want the public to know what frequencies the Navy is using to communicate. A reasonable jury could have found based on this evidence that Hernandez, Medina, and Guerrero conspired to transmit to Cuba information relating to the national defense.

The defendants argue that the evidence proves that they conspired to gather only public information, but we disagree. The defendants contend that they transmitted only public information, so the government failed to prove that they conspired to do more. This argument is based on a misunderstanding of the law. As we have previously explained, to sustain the charge of conspiracy, the government did not have to prove that the conspirators achieved their goal. See *Iannelli v. United States*, 420 U.S. at 786 n. 17, 95 S.Ct. at 1294 n. 17. The government presented ample evidence that the purpose of the conspiracy was to transmit secret information relating to the national defense. That the conspirators were often prevented from achieving their goal is immaterial.

### *c. Conspiracy to Murder*

Hernandez argues that his conviction for conspiracy to murder, 18 U.S.C. §§ 1111, 1117, is not supported by sufficient evidence. Hernandez argues that his conviction should be reversed because the government failed to prove that he intended the



murder to occur within the jurisdiction of the United States, failed to prove that he knew of the object of the conspiracy, and failed to prove that he acted with malice aforethought. Each of these arguments fails. We address each argument in turn.

First, Hernandez argues that the government was required to prove that he intended the murder to occur within the special maritime and territorial jurisdiction of the United States. Hernandez contends that, because the government did not prove that there was a plan to "confront" Brothers in international, as opposed to Cuban, airspace, his conviction for conspiracy to murder should be reversed. We disagree.

Whether sections 1111 and 1117 require proof that Hernandez intended the murder to occur within the special maritime and territorial jurisdiction of the United States "is a question of statutory construction." *Staples v. United States*, 511 U.S. 600, 606, 114 S.Ct. 1793, 1796, 128 L.Ed.2d 608 (1994). The language of the statute, the starting place of our inquiry, *Id.*, provides, "Murder is the unlawful killing of human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing ... is murder in the first degree." 18 U.S.C. § 1111(a). Section 1111(b) provides, "Within the special maritime and territorial jurisdiction of the United States, [w]hoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life." Section 1117 provides a penalty of "imprisonment for any term of years or for life" for a conspiracy to violate section

1111.

Although the statute explicitly describes the mens rea required for murder, the statute is silent about mens rea that the murder occur in the special jurisdiction of the United States. Ordinarily, we interpret statutes that are silent as to mens rea to require proof of general intent. *Ettinger*, 344 F.3d at 1158. This rule is subject to an exception when the nature of the statute is such that "congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional mens rea requirements." *Staples*, 511 U.S. at 607, 114 S.Ct. at 1798. An exception applies to section 1111.

When a criminal statute is otherwise silent, no proof of mens rea is necessary for elements that are "jurisdictional only." *United States v. Feola*, 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 1260 n. 9, 43 L.Ed.2d 541 (1975). As the Supreme Court has explained, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *Id.* "[K]nowledge of jurisdictional facts is not required in determining guilt...." *United States v. Muncy*, 526 F.2d 1261, 1264 (5th Cir.1976). In *Feola*, the Court held that a statute that prohibits assault of a federal officer does not require knowledge that the victim is a federal officer because the victim's status as a federal officer is a fact that is jurisdictional only. 420 U.S. at 686, 95 S.Ct. at 1264-65. The *Feola* Court explained that its holding "poses no risk of unfairness to defendants" because "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency

affected." *Id.* at 685, 95 S.Ct. at 1264.

Hernandez argues that the requirement that the murder occur in the special jurisdiction of the United States is more than a jurisdictional requirement. Hernandez argues that, because the government did not introduce evidence that Cuban law prohibits murder, the jurisdictional language in section 1111(a) distinguishes between potentially legitimate conduct (murder in Cuba under Hernandez's theory) and conduct that is unlawful (murder in the special jurisdiction of the United States). We disagree.

The interpretation of sections 1111 and 1117 is a question of law, *United States v. Wilk*, 452 F.3d 1208, 1221 n. 19 (11th Cir.2006), that does not depend on whether the government introduced evidence of Cuban law at trial. The discussion in *Feola* about fairness to defendants was part of an explanation by the Court for its inference that Congress intended the "federal officer" element of the assault statute to be jurisdictional only. 420 U.S. at 684-85, 95 S.Ct. at 1264. The statutory language did not expressly designate the "federal officer" requirement as jurisdictional. See 18 U.S.C. § 111(a). In contrast, we know that the requirement that a murder occur "[w]ithin the special maritime and territorial jurisdiction of the United States" is jurisdictional based on the plain language of the statute. 18 U.S.C. § 1111(b). Because it expressly defines the mens rea requirement for murder but is silent as to the mens rea requirement for the jurisdictional element, the statute "unambiguously dispenses with any requirement" that the government prove intent that the murder occur in the special jurisdiction of the United States. *United States v. Yermian*, 468 U.S. 63,

69-70, 104 S.Ct. 2936, 2939-40, 82 L.Ed.2d 53 (1984) (government need not prove knowledge of federal agency jurisdiction under false statements statute).

We hold that intent that the murder occur within the special maritime and territorial jurisdiction of the United States is not an element of section 1111. Because this intent is not an element of the substantive murder offense, it need not be proved to establish a conspiracy to murder, 18 U.S.C. § 1117:

[W]ith the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, ... where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense.

*Feola*, 420 U.S. at 696, 95 S.Ct. at 1269; see also *Muncy*, 526 F.2d at 1264. Hernandez does not argue that facts other than knowledge of the location of the shutdown are insufficient to render his conspiracy a matter of federal concern, and, in *Feola*, the Court explained that “[f]ederal jurisdiction always exists where the substantive offense is committed in the manner therein described.” 420 U.S. at 696, 95 S.Ct. at 1269. The evidence established that the shutdown actually occurred in the special maritime or territorial jurisdiction of the United States.

Second, Hernandez argues that the government did not introduce sufficient evidence to establish that

he knew the object of the conspiracy. This argument also fails. Sufficient evidence supports Hernandez's conviction.

According to the indictment, "[i]t was the object of the conspiracy to support and help implement, including with Miami-based information, a plan for violent confrontation of aircraft of Brothers to the Rescue (a Miami-based Cuban exile group ...), with decisive and fatal results." As we have previously explained, the government had to prove that Hernandez's participation in the conspiracy was "knowing and voluntary." *United States v. Suba*, 132 F.3d 662, 672 (11th Cir.1998). The government satisfied its burden.

The government introduced encrypted messages that were broadcast to Hernandez's call sign soon after Brothers dropped over Havana leaflets containing excerpts from the United Nations Declaration on Human Rights in January of 1996. A message dated January 19 said that "superior headquarters approved operacion escorpion in order to perfect the confrontation of [counterrevolutionary] actions of [Brothers]." The message instructed Hernandez that he should obtain information from Gonzalez and Juan Pablo Roque, a codefendant who along with Gonzalez had infiltrated Brothers, about several matters related to flights of Brothers: (1) whether Jose Basulto, the leader of Brothers, would be flying; (2) whether the "activity of dropping of leaflets or violation of air space" was planned; and (3) whether Roque and Gonzalez would be flying. The message instructed Hernandez to "always specify if agents are flying."

Additional messages to Hernandez stated that it



was important for Cuban officials to know when Cuban agents would be on board flights of Brothers. A January 30 message instructed Hernandez that, if Roque and Gonzalez were asked to fly at the last minute without being scheduled, they should find an excuse not to fly. If they could not avoid flying, the message instructed that they should transmit code words over the airplane radio to alert Cuba that the agents were on board. Hernandez relayed these instructions to Gonzalez in correspondence dated February 13. A message transmitted on February 18 instructed Hernandez that "under no circumstances" should Roque or Gonzalez fly with Brothers "on days 24, 25, 26 and 27 ... in order to avoid any incident of provocation that they may carry out and our response to it. Immediately confirm when you instruct both of them." An expense report from Hernandez states that Hernandez met with Roque on February 22 and Gonzalez on February 23. The shutdown occurred on February 24.

The government offered proof that Hernandez and the Cuban regime considered the operation a success. The government introduced correspondence from Hernandez written after the shutdown that says, "[I]t's a great satisfaction and source of pride to us that the operation to which we contributed a grain of salt ended successfully." The government also introduced an order from the chief of the Cuban Directorate of Intelligence that granted Hernandez "recognition for the outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February of 1996."

Hernandez argues that the government did not



prove that he received the messages before the shutdown, and he argues that the government called no witnesses to interpret the English translations of the messages. These arguments fail. The government offered ample proof about these matters.

The government introduced evidence that the encrypted messages were transmitted to Hernandez's call sign. The messages were decrypted with materials found at Hernandez's apartment. From this evidence, Hernandez's instructions to Gonzalez, the timing of Hernandez's meetings with Roque and Gonzalez, and the timing of the shutdown, a reasonable jury could have found that Hernandez received the messages that the government introduced.

The government did not need to call an expert witness to interpret the English translations of the messages that Hernandez received because the meaning of the messages was evident in the light of the other evidence that the government presented. The messages describe a plan to "perfect the confrontation" with Brothers aircraft and repeatedly instruct that Cuban agents should avoid flying, especially on February 24, 25, 26, and 27, the days of and after the shutdown. A reasonable jury could have inferred that Hernandez understood that agents were not to fly because the "confrontation" planned with Brothers was a shutdown, which would cause the death of the Cuban agents if they were on board Brothers aircraft. See *United States v. Garcia*, 405 F.3d 1260, 1269 (11th Cir.2005) (recognizing that the government may prove that a defendant knowingly and voluntarily joined a conspiracy with circumstantial evidence).

Hernandez argues that his status as a “mere agent” of the Cuban Directorate of Intelligence makes him ineligible for prosecution for “choices made by higher-ups in his government,” but we disagree. Because the evidence is sufficient to establish that Hernandez “knew the essential objective of the conspiracy, it does not matter that he did not know all its details or played a minor role in the overall scheme.” *Suba*, 132 F.3d at 672. A reasonable jury could have found based on the evidence that Hernandez knowingly and voluntarily participated in a conspiracy to shoot down aircraft of Brothers.

Third, Hernandez argues that the government failed to prove that Hernandez acted with malice aforethought. We disagree. Sufficient evidence supports this element.

“Malice aforethought” is a legal term of art that describes the several mental states that are associated with murder. See George P. Fletcher, *Rethinking Criminal Law* § 4.3.2, at 270 (2000); James Fitzjames Stephen, *Digest of the Criminal Law* § 223(a)-(b), at 165-66 (4th ed. 1887). Malice aforethought is an element of both murder under section 1111 and conspiracy to murder under section 1117. See *Feola*, 420 U.S. at 686, 95 S.Ct. at 1265 (“[I]n order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.”). Malice aforethought ordinarily describes several kinds of murder. See 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.1(a), at 416-18 (2d ed. 2003). This appeal concerns only one kind because the jury was instructed that malice aforethought

requires proof that the killing was intentional.

The intent-to-kill form of malice aforethought can be established, as it is here, by proof that the defendant acted with the desire that the death would occur or knowledge "that such a result is substantially certain to occur, whatever his desire concerning that result." *Id.* § 14.1(a), at 428. The totality of the evidence, which includes the numerous messages to Hernandez that stressed the importance of warning Cuban agents not to fly and of warning the agents to alert Cuba if they could not avoid flying and Hernandez's statements after the shootdown that the operation "ended successfully," is sufficient to support a finding beyond a reasonable doubt that Hernandez acted with knowledge that the death of the persons on board the planes of Brothers was substantially certain.

The dissent contends that the government failed to introduce sufficient evidence that the object of the conspiracy was a shootdown and that Hernandez agreed to a shootdown in international, as opposed to Cuban, airspace. The dissent acknowledges that the evidence establishes an agreement to "confront" aircraft of Brothers but contends that "there are many ways a country could 'confront' foreign aircraft. Forced landings, warning shots, and forced escorted journeys out of a country's territorial airspace are among them-as are shoot downs." *Post* at 1025.

When the evidence is viewed in the light most favorable to the government, there are at least two reasons to conclude that the government proved that a shootdown was contemplated. First, the instructions that Hernandez received from the Cuban Directorate of Intelligence and relayed to the agents

who had infiltrated Brothers support an inference that a shutdown was planned. Second, the correspondence from Hernandez written after the shutdown that recognizes that the operation "ended successfully" establishes Hernandez's guilt.

A reasonable jury could infer that Hernandez recognized that the Cuban Directorate of Intelligence instructed him to specify when Cuban agents were flying, tell the agents not to fly unscheduled or on the days of and around the shutdown, and tell the agents to transmit code words on the radio if they could not avoid flying because the Directorate wanted to ensure that the lives of Cuban agents were not placed in danger. A forced landing, warning shots, or a forced escorted journey would not have placed the agents in danger even if they had been on board the aircraft at the time. A reasonable jury could find that agents were not to fly because a shutdown was planned.

The dissent contends that "[i]t is just as reasonable to conclude that the Directorate of Intelligence did not want its agents flying on those days because of the dangers inherent in any confrontation involving airplanes." *Post* at 1025 n.4. This inference, which is at odds with the verdict of the jury, is irrelevant under our standard of review. "The jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial," *United States v. Molina*, 443 F.3d 824, 828 (11th Cir.2006), but we do not enjoy the same freedom. We "must accept all reasonable inferences ... made by the jury." *Id.* The inference the jury drew from the evidence that Hernandez understood that a shutdown was planned is

reasonable. Other reasonable inferences the evidence might support are immaterial. *Id.*

Even if the communications that Hernandez received in advance of the shootdown were not enough, Hernandez's correspondence written afterward that endorsed the shootdown as a success also establishes Hernandez's guilt. The dissent characterizes this correspondence as an "acknowledg[ment of] participation" in a plan to confront Brothers, *post* at 1025, but this statement proves more. Again, we must consider the evidence in the light most favorable to the government and draw all reasonable inferences in its favor, *Khanani*, 502 F.3d at 1293, and Hernandez's statement need be taken only at face value. Success means "[t]he prosperous achievement of something attempted" or, stated differently, "the attainment of an object according to one's desire." XVII *The Oxford English Dictionary* 93 (2d ed.1989). A reasonable jury was entitled to find that, when Hernandez said the operation ended successfully, he meant it. Hernandez and his co-conspirators succeeded when the aircraft were shot down.

The argument by the dissent that the government did not meet its burden because it failed to prove that Hernandez intended for the shootdown to occur in international airspace also fails. The dissent accepts Hernandez's argument that the killing that occurred would not have been unlawful had it occurred in Cuban airspace, but, even if we assume that this argument is correct and that an agreement to commit a justified killing would not be prohibited by the conspiracy statute, 18 U.S.C. § 1117, ample evidence establishes that Hernandez

conspired to commit the unlawful murder that actually occurred. Hernandez's statement after the shootdown that the operation ended successfully alone allows a finding by a reasonable jury that the conspirators intended to commit an unlawful killing. If the plan had been to prepare Cuba to defend itself with a justified shootdown over Cuba, then the plan would have failed. What occurred, and what Hernandez called a success, was an unjustified killing in the special maritime and territorial jurisdiction of the United States. A reasonable jury could take Hernandez at his word and find that what occurred was what Hernandez intended. Additionally, an order from the chief of the Cuban Directorate of Intelligence granted Hernandez "recognition for the outstanding results achieved on the job, during the provocations carried out by the government of the United States this past 24th of February of 1996." These statements support a finding that when the planes were shot down, everything, including the unjustified killing in the jurisdiction of the United States, went according to plan. Hernandez's conviction for conspiracy to murder is affirmed.

#### *H. Sentences.*

Gonzalez, Campa, Hernandez, Medina, and Guerrero each argue that the district court erred when it imposed their respective sentences. Some of these arguments have merit, and others fail. We address the arguments of each defendant in turn.

##### *1. Gonzalez's Sentence.*

Gonzalez received a sentence of ten years of imprisonment for his conviction for acting as an



agent of a foreign government without notifying the Attorney General, 18 U.S.C. § 951, and a consecutive sentence of five years of imprisonment for his conviction for conspiracy to violate section 951 and to defraud the United States, 18 U.S.C. § 371. Gonzalez argues that the district court erred by imposing consecutive sentences for his two counts of conviction. We disagree. The sentence imposed by the district court was not erroneous.

The government and Gonzalez agree that section 951 is "a felony ... for which no guideline expressly has been promulgated." United States Sentencing Guidelines § 2X5.1 (Nov.2001). Nor has any Guideline been promulgated for a conspiracy to violate section 951. Because "there is not a sufficiently analogous guideline,"*Id.*, the general purposes of sentencing, 18 U.S.C. § 3553, control the discretion of the district court. U.S.S.G. § 2X5.1.

The district court considered the purposes of sentencing described in section 3553(a)(2) and expressly recognized its obligation to "impose a sentence sufficient, but not greater than necessary, to comply with" those purposes. 18 U.S.C. § 3553(a). The district court selected a sentence of ten years of imprisonment, the statutory maximum, for the conviction under section 951 and a consecutive sentence of five years of imprisonment, also the statutory maximum, for the conspiracy conviction. Gonzalez's argument that the district court erred by imposing consecutive sentences fails.

Gonzalez argues that the district court should have followed the section of the Guidelines that governs the imposition of a sentence on a defendant subject to an undischarged term of imprisonment,

U.S.S.G. § 5G1.3, but we disagree. We have explained that “[a] guideline’s meaning is derived first from its plain language and, absent ambiguity, no additional inquiry is necessary.” *United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir.2004). Section 2X5.1 is plain and unambiguous. Where “no guideline expressly has been promulgated” and “there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b)... control, except that any guidelines and policy statements that can be applied meaningfully ... shall remain applicable.” U.S.S.G. § 2X5.1. Section 5G1.3(b) cannot be applied meaningfully to Gonzalez in this appeal because he is not subject to an undischarged term of imprisonment. The district court has discretion to impose consecutive sentences to comply with the requirements of section 3553. *See* 18 U.S.C. § 3584(a)-(b); *see also* U.S.S.G. § 5G1.2(d) (permitting the district court to order consecutive sentences “to the extent necessary to produce a combined sentence equal to the total punishment”). The district court did not err by selecting consecutive sentences.

Gonzalez also argues that the district court ignored mitigating evidence that he presented. Gonzalez’s sentencing hearing spanned two days, during which the district court heard extensive argument from defense counsel about mitigating factors. The court considered Gonzalez’s arguments that he played a minor role in the offense; that he held steady employment; that policies of the United States toward Cuba are “bizarre”; that Gonzalez’s targets in the United States were Cuban exile groups, instead of the government of the United States; and that Gonzalez had no criminal record.

The court also considered Gonzalez's family connections and that he was separated from his family because he was housed in the special housing unit at the federal detention center.

The district court considered the arguments of counsel made in court and in written objections to the presentence investigation report, along with the purposes of sentencing described in section 3553, when the court imposed Gonzalez's sentence. We cannot say that the sentence was, as a matter of law, greater than necessary to further those purposes. The district court did not err.

Finally, Gonzalez argues that the sentencing court ignored the Guideline section that applies to the conspiratorial object of defrauding the United States. U.S.S.G. § 2C1.7. The district court does not appear to have calculated Gonzalez's sentence under section 2C1.7, but we need not consider this argument because the district court imposed the statutory maximum penalty under the conspiracy statute based on the other object—a violation of section 951. The Guideline calculation under section 2C1.7 would not affect Gonzalez's sentence.

## 2. Campa's Sentence

Campa argues that the district court erred when it applied an enhancement of three offense levels under section 3B1.1(b) of the Guidelines based on a finding that Campa was a "manager or supervisor." We agree with Campa. The factual findings by the district court do not support this enhancement.

We have held that "a section 3B1.1 enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy." *United States v.*

*Glover*, 179 F.3d 1300, 1303 (11th Cir.1999). The enhancement is unwarranted in the absence of a finding that the defendant asserted control or influence over "at least one other participant" in the crime. *Id.* at 1302. The district court explained that its decision to apply the adjustment under section 3B1.1(b) was "based on [Campa's] managing the assets of the search by [Medina] to obtain death certificates that would subsequently be utilized for false identification documents." Under *Glover*, this finding is inadequate to support an enhancement under section 3B1.3(b).

The government concedes that the district court acted in "apparent contravention" of *Glover*, but argues that Campa never raised the issue before the district court and that the error is not reversible. We disagree. Campa preserved the argument, and the government has not established that the error was harmless.

Before the district court imposed Campa's sentence, Campa argued that "[t]he [c]ourt in order to sustain this enhancement must find vis-a-vis someone, [Campa] played this managerial role. There is no evidence he had any control over Mr. Medina nor did he have any control or supervisory responsibilities over anyone who has been identified to this court." Campa did not cite *Glover* in the district court, but he raised this argument in sufficiently "clear and simple language" to preserve the issue. See *United States v. Zinn*, 321 F.3d 1084, 1087 (11th Cir.1986).

Because Campa properly preserved this issue, a remand is required unless the government can establish that the error is harmless under the

standard stated in *Kotteakos v. United States*, 328 U.S. 750, 762-66, 66 S.Ct. 1239, 1246-48, 90 L.Ed. 1557 (1946). See *United States v. Mathenia*, 409 F.3d 1289, 1292 (11th Cir.2005). A sentencing error, under the Guidelines, is harmless if a court considers the proceedings in their entirety and determines that the error did not affect the sentence “or had but very slight effect.” *Kotteakos*, 328 U.S. at 764, 66 S.Ct. at 1248. If we can say “with fair assurance” that the sentence was not “substantially swayed by the error,” we may affirm. *Id.* at 765, 66 S.Ct. at 1248. We have explained that this standard for review of harmless error “is as difficult for the government to meet ... as it is for a defendant to meet the third-prong prejudice standard for plain error review.” *Mathenia*, 409 F.3d at 1292.

The government has not satisfied its burden. The government argues that there is evidence that would support a finding that Campa managed another participant, but we cannot say with fair assurance that the district court would have made that finding. As the United States Supreme Court explained, “[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.” *Kotteakos*, 328 U.S. at 765, 66 S.Ct. at 1248. Whether Campa managed or supervised one or more participants is a question of fact, and the *Kotteakos* standard does not allow us to assume the role of the factfinder. See *Id.* at 765, 66 S.Ct. at 1246. Remand is necessary to allow the district court to consider whether to apply the enhancement under section 3B1.1 based on findings other than Campa’s management of assets.

Campa also adopts the argument of Medina that



the district court erred by increasing his offense level for obstruction of justice and the argument of Gonzalez that the district court erred by imposing consecutive sentences. As we explain elsewhere, these arguments fail. The district court did not err by applying the adjustment for obstruction of justice or by imposing consecutive sentences.

### 3. Medina's Sentence

Medina argues that the district court committed three errors when it calculated his sentence: (1) the court selected an incorrect base offense level, which it erroneously adjusted based on offense conduct; (2) the court erred when it enhanced his offense level for obstruction of justice; and (3) the court erred when it declined to depart downward based on his minor role in the offense. We address each argument in turn.

Medina argues that the district court selected the incorrect base offense level for several reasons. First, Medina argues that the district court followed an incorrect Guideline section to compute his base offense level. Section 2X1.1(c) of the Guidelines explains that "[w]hen a [ ] ... conspiracy is expressly covered by another offense guideline section, apply that guideline section." The district court applied section 2M3.1, the Guideline applicable to violations of a federal statute, 18 U.S.C. § 794, that expressly covers both the gathering of national-defense information to aid a foreign government and conspiracy to do so.

Medina argues that the district court should have applied section 2X1.1(a), which applies to conspiracies not covered by a specific offense Guideline to determine his base offense level. We



disagree. Our precedent, *United States v. Thomas*, 8 F.3d 1552, 1564-65 (11th Cir.1993), guides our resolution of this issue.

Medina's conspiracy offense is analogous to a conspiracy to violate the Hobbs Act. In *Thomas* we held that the district court correctly refused to apply section 2X1.1(a) to a Hobbs Act conspiracy because "[a] conspiracy to violate the Hobbs Act is a violation of the Hobbs Act itself." *Id.* at 1564. Based on the reasoning of *Thomas*, the district court correctly applied section 2M3.1 because a conspiracy to violate section 794 is also a violation of section 794.

Medina's argument that the district court should not have followed *Thomas* because the decision from the Second Circuit, *United States v. Skowronski*, 968 F.2d 242, 250 (2d Cir.1992), that we found persuasive in *Thomas* is no longer followed in that circuit, see *United States v. Amato*, 46 F.3d 1255, 1261 (2d Cir.1995), fails. *Thomas* remains good law in this Circuit, and, in the absence of a contrary opinion of the Supreme Court or of this Court sitting en banc, we cannot overrule a decision of a prior panel of this Court. *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir.2007). The district court was correct to apply section 2M3.1.

Medina next argues that the district court erred when, under section 2M3.1(a)(1), it selected a base offense level of 42, which is appropriate "if top secret information was gathered or transmitted," instead of a base offense level of 37, which is appropriate "otherwise," § 2M3.1(a)(2). We agree with Medina. The district court did not find that top secret information was gathered or transmitted; it based its selection of the base offense level on the finding that

the object of the conspiracy was to obtain top secret information. Under section 2M3.1(a)(2), a base offense level of 37 is appropriate based on this finding.

Our precedent in *United States v. Chastain*, 198 F.3d 1338 (11th Cir.1999), is instructive on this issue. *Chastain* involved an enhancement under section 2D1.1(b)(2), which provides, "If the defendant unlawfully imported or exported a controlled substance under circumstances in which an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, ... increase by two levels." *Id.* at 1353 (quoting U.S.S.G. § 2D1.1(b)(2)) (omission in original) (internal quotation marks omitted). The district court enhanced the sentence based upon a finding that the defendants had planned to use a private plane to import narcotics. *Id.* We reversed. We explained that "[w]hen the language of the guideline is clear, it is not necessary to look elsewhere for interpretation. Here, the language of the guideline clearly contemplates a completed event, an actual importation." *Id.*

The district court erred. Like the Guideline that we interpreted in *Chastain*, section 2M1.3 clearly contemplates a completed event: the actual gathering or transmission of top secret information. Because the district court did not find that top secret information was gathered or transmitted, we remand for resentencing.

Medina next argues that the district court erred when it declined to order a consultation with an "authorized designee" of the President so that Medina could take advantage of application note 3,

which allows the court to depart from the Guidelines upon a representation by the President that the imposition of a non-Guideline sentence is "necessary to protect national security or further the objectives of the nation's foreign policy." U.S.S.G. § 2M3.1 cmt. n.3. We disagree. Nothing in the Guideline section or the application notes empowers the district court to require the President or his designee to express any view about a sentence.

Medina next argues that the district court erred when it declined to grant a downward departure that "may be warranted" when revelation of "the information at issue" "is likely to cause little or no harm." U.S.S.G. § 2M3.1 cmt. n.2. The district court based its decision not to depart downward on its finding that the object of the conspiracy was to gather or transmit "top secret information" under section 2M3.1(a)(1). The district court held that application note 2 is inapposite when 2M3.1(a)(1) applies because top secret information, by definition, "reasonably could be expected to cause exceptionally grave damage," U.S.S.G. § 2M3.1 cmt. n.1. We do not consider whether a departure under application note 2 was appropriate. We remand to the district court to consider in the first instance whether a departure is appropriate in the light of our conclusion that section 2M3.1(a)(1) is inapplicable in the absence of a finding that top secret information was gathered or transmitted.

Medina next argues that the district court erred when it applied a two-offense-level upward adjustment for obstruction of justice under section 3C1.1 of the Guidelines. The adjustment was based on a finding that Medina gave a false name to the

magistrate judge at his pretrial detention hearing. Medina, whose real name is Ramon Labanino, concedes that he "stood by his legend and stated that he was Luis Medina," but argues that his deception was part of the offense, instead of the "investigation, prosecution, or sentencing," U.S.S.G. § 3C1.1 cmt. n.1. He also argues that the evidence did not establish that he had the requisite mens rea or that his conduct significantly hindered the prosecution or investigation of the offense. Each of these arguments fails.

Section 3C1.1 applies to "obstructive conduct" that "occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction." U.S.S.G. § 3C1.1 cmt. n.1. Medina relies on language in an Eighth Circuit decision that explains that "[s]ection 3C1.1 does not apply to conduct that is part of the crime itself," *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir.1991), and argues that his use of the legend "Luis Medina" before the magistrate judge was part of the crime of espionage. We disagree.

Application note 1 does not exclude from the scope of section 3C1.1 conduct that relates to the offense of conviction. To the contrary, it expressly requires a relationship between the obstructive conduct and that offense or "an otherwise closely related case." See U.S.S.G. § 3C1.1 cmt. n.1(B). The relevant question is whether the obstructive conduct occurred during the course of the investigation, prosecution, or sentencing. Medina's false statement clearly occurred within the scope of application note 1.

Providing a false name to a magistrate at a

detention hearing qualifies as obstructive conduct. Application note 4(f) lists "providing materially false information to a judge or magistrate" as an example of the kind of conduct to which section 3C1.1 applies. "[I]f believed," a false name "would tend to influence or affect the issue[s] under determination" by a magistrate judge in a detention hearing. U.S.S.G. § 3C1.1 cmt. n.6. The magistrate judge must consider, among other things, the family ties, financial resources, residence, past conduct, criminal history, record of appearance at court proceedings, and probationary status of the person before the magistrate judge in a detention hearing. See 18 U.S.C. § 3142(g)(3). A false name, if believed, would tend to affect the magistrate judge's assessment of these factors. See *United States v. Tran*, 285 F.3d 934, 940 (10th Cir.2002) ("It is plain that [the defendant's] misidentification of himself was an attempt to obstruct or impede the administration of justice, and that this attempt might well have borne fruit at his detention hearing if the court had decided to release him based on his apparent lack of a criminal history."); *United States v. Charles*, 138 F.3d 257, 267 (6th Cir.1998); *United States v. Berrios*, 132 F.3d 834, 840 (1st Cir.1998); *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir.1994); *United States v. Blackman*, 904 F.2d 1250, 1259 (8th Cir.1990).

Medina next argues that the evidence does not establish that Medina acted with the mens rea required under section 3C1.1. This argument is specious. Medina concedes that he deliberately gave a false name to maintain the legend that he had previously adopted for the purpose of deception. This conduct established that Medina "consciously act[ed]



with the *purpose* of obstructing justice.” *United States v. Burton*, 933 F.2d 916, 918 (11th Cir.1991) (quoting *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir.1990)) (internal quotation mark omitted).

Medina next argues that the district court must explain how Medina’s conduct significantly hindered the prosecution or investigation of the offense, but this argument misreads the application notes of section 3C1.1. Note 5(a) explains that “providing a false name or identification document *at arrest*” ordinarily does not warrant application of the adjustment unless “such conduct actually resulted in a significant hindrance to the investigation or prosecution of the ... offense.” U.S.S.G. § 3C1.1 cmt. n.5(a) (emphasis added). Medina’s adjustment was based on the provision of a false name to a magistrate judge at a detention hearing. The adjustment was appropriate whether or not a significant hindrance occurred. U.S.S.G. § 3B1.1 cmt. n.4(f).

Finally, Medina argues that the district court erred when it declined to adjust his offense level downward because Medina was a “minimal” or “minor” participant under Guideline section 3B1.2. In support of this argument, Medina says little more than that “[h]e simply was a small cog in a big machine.” Medina’s argument fails. Medina’s role is measured not against the totality of conduct by the Cuban regime, but “against the relevant conduct for which [he] has been held accountable.” *United States v. Rodriguez De Varon*, 175 F.3d 930, 940 (11th Cir.1999). We cannot say that the district court clearly erred when it declined to find that Medina was “substantially less culpable than the average participant” in the conduct for which Medina is



responsible. U.S.S.G. § 3B1.2 cmt. n.3(A).

#### 4. Guerrero's Use of a Special Skill

Guerrero argues that the district court erred when it found that he "used a special skill[ ] in a manner that significantly facilitated the commission or concealment of the offense" and applied a two-offense-level adjustment under section 3B1.3 of the Sentencing Guidelines. U.S.S.G. § 3B1.3. Guerrero argues that he did not use a special skill and his skills did not significantly facilitate the commission of the offense. We disagree.

Guerrero argues that his training is indistinguishable from his criminal conduct and inadequate to support a special-skill adjustment, but this argument fails. A "special skill" is "a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." U.S.S.G. § 3B1.3 cmt n.3. The district court found that Guerrero was specially trained in radio intelligence, radio and computer encryption and decryption, and civil engineering.

Courts have held that "[t]he skill must be a 'legitimate' skill turned to evil purposes." See Roger W. Haines, Jr. et al., *Federal Sentencing Guidelines Handbook* 1079 (2007) (footnote omitted). The Ninth Circuit, for example, has held that "[s]tanding alone, [a defendant's] ability to manufacture methamphetamine cannot be the basis of a special skill enhancement." *United States v. Mainard*, 5 F.3d 404, 405 (9th Cir.1993). The District of Columbia Circuit followed similar reasoning when it held that proof that the defendant "knew how to commit the base offense of manufacturing PCP" was "insufficient

to justify a special skill enhancement under § 3B1.3.” *United States v. Young*, 932 F.2d 1510, 1515 (D.C.Cir.1991).

Skills in civil engineering, radio technology, and computer technology are legitimate skills that Guerrero turned to criminal purposes. See *United States v. Malgoza*, 2 F.3d 1107, 1110 (11th Cir.1993) (radio operation); *United States v. Prochner*, 417 F.3d 54, 62 (1st Cir.2005) (computer skills); *United States v. Sain*, 141 F.3d 463, 476 (3d Cir.1998) (civil engineering). Unlike skill in the art of methamphetamine or PCP manufacture, which cannot easily be put to legitimate use, Guerrero’s skills have legitimate value independent of the criminal activity of which Guerrero was convicted. The district court did not err by finding that Guerrero possessed a “special skill.”

Guerrero also challenges the finding that his skills significantly facilitated the commission of the offense by enabling him to craft and report a mental blueprint of facilities that he observed while working at the Naval Air Station at Key West, but we disagree. We have explained that “significant facilitation” occurs when a “person in the position of trust has an advantage in committing the crime because of that trust and uses that advantage in order to commit the crime.” *United States v. Barakat*, 130 F.3d 1448, 1455 (11th Cir.1997). This formulation applies when a special skill is involved. The district court could have reasonably found that Guererro, because of his training in civil engineering, had an advantage in composing and transmitting a mental blueprint, and he used that advantage to commit the crime of conspiracy to gather and

transmit national-defense information.

#### 5. The Sentences of Guerrero and Hernandez

Guerrero and Hernandez both adopt several arguments of Medina. They adopt Medina's arguments that the district court erred when it declined to order a consultation with the President's authorized designee, when it applied section 2M3.1 to determine their base offense level, when it increased their offense level for obstruction of justice, and when it declined to depart downward based on their roles in the offense. As we explained earlier, these arguments fail.

Two of Medina's arguments that Hernandez and Guerrero adopt have merit, but a remand is necessary for Guerrero only. As we explained before, the district court erred when it applied section 2M3.1(a)(1) instead of section 2M3.1(a)(2) in the absence of a finding that top secret information was gathered or transmitted, and this error undermines the basis for the conclusion by the district court that it did not have authority to depart under application note 2 of section 2M3.1. We remand to allow the district court to resentence Guerrero in the light of our ruling, but we need not remand for resentencing of Hernandez. Because he was sentenced to life imprisonment on his murder-conspiracy conviction, any error in the calculation of Hernandez's concurrent sentence for conspiracy to gather and transmit national-defense information is "irrelevant to the time he will serve in prison." *United States v. Rivera*, 282 F.3d 74, 77-78 (2d Cir.2000). Hernandez need not be resentenced because the errors under Guideline section 2M3.1 are harmless with respect to him. See Fed.R.Crim.P. 52(b); *Williams v. United*

*States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992); *United States v. Pierre*, 484 F.3d 75, 91 (1st Cir.2007); *Rivera*, 282 F.3d at 77; *United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir.1995); see also *United States v. Jones*, 28 F.3d 1574 (11th Cir.1994) (recognizing our discretion to decline to review sentencing errors under the "concurrent sentence doctrine"), *vacated*, 516 U.S. 1022, 116 S.Ct. 663, 133 L.Ed.2d 515 (1995), *opinion reinstated in part*, 74 F.3d 275 (11th Cir.1996); *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir.1997). But see *United States v. Kincaid*, 898 F.2d 110, 112 (9th Cir.1990) (rejecting the concurrent sentence doctrine and its application to sentencing errors).

#### IV. CONCLUSION

We AFFIRM the convictions of each defendant and the sentences of Gonzalez and Hernandez. We VACATE the sentences of Campa, Medina, and Guerrero and REMAND for resentencing proceedings consistent with this opinion.

AFFIRMED in part, VACATED in part, and REMANDED in part.

BIRCH, Circuit Judge, specially concurring:

I concur in Judge Pryor's opinion for the court. As evident from the dissent on the issue of conspiracy to commit murder, this issue presents a very close case. However, given our standards of review with

regard to Hernandez's conviction on Count 3, I conclude that the conviction should be affirmed.

I remain convinced, for all the reasons and facts set out in my prior dissent that the motion for change of venue should have been granted. See *United States v. Campa*, 459 F.3d 1121, 1155 (11th Cir.2006) (en banc). The defendants were subjected to such a degree of harm based upon demonstrated pervasive community prejudice that their convictions should have been reversed. The Supreme Court has not addressed the law concerning Fed.R.Crim.P. 21 motions for change of venue since *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Given the technological advances and 24-hour news cycle that have become prevalent in our nation since 1984, I respectfully suggest that this case provides a timely and appropriate opportunity for the Court to address the issue of change of venue in this internet and media permeated century.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion with the exception of section 3.c. (the court's affirmance of Count 3, conspiracy to commit murder), from which I respectfully dissent. In my view, the Government failed to present evidence sufficient to prove beyond a reasonable doubt that Hernandez agreed to participate in a conspiracy, the object of which was to shoot down BTTR planes over international airspace, resulting in the deaths of several pilots.

## I. FACTS

Brothers to the Rescue ("BTTR") repeatedly and knowingly had violated Cuban airspace since 1994. Jose Basulto, BTTR's founder and leader, testified that on April 17, 1994 he flew with Bernadette Pardo-a television news reporter-close to the coast of Cuba. Consistent with BTTR's customary practice, a few other BTTR aircraft accompanied Basulto's plane. The news reporter videotaped the flight and portions were played for the jury.

The videotape showed a Cuban military aircraft "MiG" circle the BTTR planes and fly in front of Basulto's. Basulto radioed the MiG pilots, stating, "On behalf of the Cuban exiles, the group that makes the work of Brothers to the Rescue possible, we wish to Cuba, the Cuban people, the armed forces that you could make freedom for Cuba possible and to do everything you can to bring an end to Castro's regime." The MiG's pilots did not respond to Basulto's encouragement to defect from Castro's Government and did not fire any shots.

Basulto testified that on the next occasion of knowingly violating Cuban airspace, he flew over a small town where his father had been born near Guantanamo Naval Base and dropped BTTR bumper stickers. This incursion was on November 10, 1994. Once again, the Cuban Government did not respond with violence.

On July 13, 1995, BTTR escalated its efforts. To commemorate Cuba's sinking of a tugboat full of people (ostensibly leaving Cuba) within Cuba's territorial waters a year earlier, BTTR planned a demonstration in association with Democracia, a



related anti-Castro group. Prior to July 13th, BTTR notified both U.S. and Cuban officials of its plan to commit "civil disobedience" within Cuban territorial waters. Cuba prepared itself, placing gun boats in the water and preparing MiGs. The United States State Department issued a public announcement, which Basulto saw, stating that pilots should not violate Cuban airspace.

Despite the warning, on July 13th, BTTR flew four planes into Cuban airspace and Democracia drove a boat (also named "Democracia") into Cuban territorial waters. Basulto, the pilot in one of the planes, testified that as he approached Cuban airspace, Havana Air Traffic Control told him to leave. He ignored those warnings.

Basulto further testified that MiGs were in the air-passing and circling over him-and he saw gun boats in the water. Basulto dropped a smoke canister out of his window at the point where the tugboat was believed to have been sunk. Then he flew over a Cuban gun boat, dropping leaflets.

He also flew the plane low over downtown Havana for approximately 13 minutes, dropping nearly 20,000 leaflets and religious medals. Basulto testified that he flew over Havana to divert attention away from the Democracia as those on board had notified Basulto via radio that a Cuban gun boat had rammed it.

Despite this run-in with the Cuban military, all participants returned safely to Miami. In an interview with the news media, Basulto told reporters that he "engaged in an act of civil disobedience and I did it to show the Cuban people

they could do the same thing.”

Following the July 13, 1995 incident, a Cuban official sent a letter to the Federal Aviation Administration (“FAA”) notifying the FAA of the “violations of the Cuban aeronautical laws” committed by BTTR that day. The letter stated that the aircraft deviated from the routes described in their flight plans and ignored Cuba’s warnings. The letter also stated that these actions “may bring grave consequences” and asked that American officials “adopt whatever measures are necessary” to avoid “provocation” of Cuban sovereignty. The letter ended with a quotation from a public declaration Cuba released the day after the July 13th airspace violations: “Any craft proceeding from the exterior that invades by force our sovereign waters could be sunk and any aircraft downed.”

The United States Department of State then issued a statement warning pilots to avoid penetrating Cuban airspace. The statement quoted the Cuban declaration that any boat from abroad can be sunk and any airplane downed and stated that “[t]he Department takes this statement seriously.”

Despite the warnings from both Cuba and the United States, BTTR flew again in January of 1996. Over the course of two flights-on the 9th and 13th-BTTR escalated its efforts even further, dropping nearly 500,000 leaflets over Havana and nearby communities. The parties disputed at trial whether BTTR planes violated Cuban airspace on these flights, but viewing the facts in the light most favorable to the Government-as we must-none of the BTTR planes entered into Cuban airspace in January. According to Basulto, after taking into

consideration wind speed and altitude, BTTR dropped these flyers in international airspace calculating that they would drop in or near Havana.

BTTR did not entirely ignore the warnings. In fact, Basulto and other BTTR members specifically contemplated that if they violated Cuban airspace the Cuban military might confront them and force them to land. Before the flight on January 9, 1996, BTTR made a videotape that it left behind in case the pilots did not return. Basulto stated, "If anything happens, being that we might be made to land in Cuba, we would like to clarify that, under pressure, any human being may say anything against his beli[efs]." Arnaldo Iglesias, another BTTR member, stated on the tape that he habitually blinked his eyes and that "[I]n case they were to make us land in Cuba, I'm going to make a great effort not to blink. Which means that what I'm saying, I don't really feel." Billy Schuz, another BTTR member, then told the camera that he would do the opposite: that if captured and forced to land in Cuba, he would "blink continually."

On January 15, 1996-two days after the last leaflet dropping-Basulto appeared via telephone on "En Vivo," a Cuban radio program. Basulto acknowledged responsibility on behalf of BTTR for the leaflet droppings. Portions of the conversation are relevant here:

[Host 1]: You were not attacked, the planes, nothing, right?

[Basulto]: That's right. We were not .... uh, we have not received any type of, of attack

from the Cuban government, up to now it has only been verbal.

...

[Host 1]: [W]hat was the objective sought, that you seek with this, with this action[?]

[Basulto]: Several objectives, one of them, the first is to give a message of solidarity. One of the messages in the flyers says uh, "Not comrades, brothers," which is the same theme we've used before. Others say: "I am change," implying that the main role for change in Cuba belongs to the Cuban people, who are the ones who have to act to change this regime.... All those pamphlets had, in the back, one or more of the chapters of the Universal Declaration of Human Rights, and in the back they also said: "Cuban, fight for your rights." ... [W]e are urging our people, on the thirteenth of every month, they use, and I say thirteenth of every month because we use it as a reminder of the incident that happened on March thirteenth, the sinking of that boat, which was so tragic, and we use the thirteenth from now on so that on every month, all of us Cubans on the thirteenth do something, uh, some act of opposition, uh, of direct civic action against the government ... until we are able to gain enough strength to stop that government....

...

[Host 1]: Basulto, to what do you attribute the fact that the Cuban government did not have, did not have a military response against you, lack of organization, surprise[ ]?

[Basulto]: That is the same question that our compatriots on the island should ask [sic] themselves when they go to fear the government at a time they plan on doing something against it. We've been willing to take personal risks for this, they must be willing to do the same. Let them see that this regime is not invulnerable, that Castro can be penetrated, that many things can be done that are at our disposal. The thing is that we must, once and for all, do away with that internal police that we carry with us, that we think we're always being watched. Well, we're asking our people to meditate upon the possible things that can be done there, and for them to carry them out on the thirteenth day of each month.

Basulto's testimony at trial was consistent with his "En Vivo" interview: he wanted his incursions into Cuban airspace to serve as an example to Cubans. He testified that he wanted to inspire Cubans to imitate his defiance of the Cuban Government and topple Castro's regime.

Also on January 15, 1996, the Cuban Government again sent a letter to the FAA,

informing the FAA that two of the same planes that crossed into Cuban airspace in July again crossed into Cuban airspace on January 13th. The letter quoted a public declaration that "Cuba has the necessary measures to guarantee integrity of [its] national territory" and that "violators [of Cuban airspace] should also be prepared to face the consequences." The letter stated that such incursions into Cuban airspace could result in "serious consequences" for the crews and, again, Cuba appealed to the United States to adopt the necessary measures to prevent BTTR planes from violating Cuban airspace.

On February 24, 1996, three BTTR planes flew in international airspace close to Cuban territorial waters. As the planes approached Cuba, they were warned that they were "in danger" and that they were flying into an area that was "activated." Basulto, however, ignored these warnings and his plane crossed into Cuban territory. The other two planes did not enter Cuban territory but were shot down 4.8 and 9.5 miles away from Cuban territorial airspace, respectively. When the shoot down occurred, Basulto's plane was 2.1 miles into Cuban territorial airspace.

Basulto testified that at no time in his almost 2000 BTTR flights prior to February 24th did a MiG approach BTTR planes in international airspace. He also conceded at trial that he had been hearing the "warnings regarding the dangers of violating Cuban airspace for a long time" and that "we knew" a consequence of entering Cuban airspace could be a shoot down.

Within this context, we examine the evidence



against Hernandez. The Government points to three intercepted communications between the Cuban Government and Hernandez to demonstrate the alleged conspiracy to commit murder. The first communication was sent on January 29, 1996, two weeks after the 500,000 leaflet dropping but before the shoot down. It is undisputed that prior to this date, there is no evidence linking Hernandez to a murder conspiracy. The January 29th message read:

Superior Headquarters approved Operacion Escorpion in order to perfect the confrontation of [counter-revolutionary] actions of BTTR. Info from [Roque] and [Gonzalez] should come with clear and precise specifications that allow to know without a doubt that Basulto is flying, whether or not activity of dropping of leaflets or violation of air space; if [Roque] or [Gonzalez] are or are not flying, anticipated plan any type BTTR flights, in order to know about these activities ahead of time. If there is not access this should also be a priority. Always specify if agents are flying....

The next day, the Cuban Directorate of Intelligence<sup>1</sup> added:

In addition report types of planes flying, registration, pilots and passengers, permission for flight, day and time, altitude, distance, what type of action will be taken. If

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<sup>1</sup> The intelligence gathering body within the Cuban government for whom the defendants worked.

[Roque] and [Gonzalez] are asked to fly at the last minute without being scheduled find excuse not to fly. If they cannot avoid it [Gonzalez] will transmit over the airplane radio the slogan for the July 13 martyrs viva Cua and [Roque] should call his neighbor Amelia and tell her that he will call her on Wednesday. If he cannot call he should say over the radio long live Brothers to the Rescue and Democracia....

The last relevant intercepted message (sent on February 18) read:

MX instructs that under no circumstances should [Roque] nor [Gonzalez] fly with BTTR or another organization on days 24, 25, 26, and 27, coinciding with celebration of Concilio Cubano in order to avoid any incident of provocation that they may carry out and our response to it. Immediately confirm when you instruct both of them....

Evidence showed that Hernandez met with both Roque and Gonzalez and relayed the messages received from the Directorate of Intelligence. These three messages are the extent of the evidence that the Government presented against Hernandez relating to his knowledge and conduct prior to the shoot down of the BTTR planes.

The Government also points to three other intercepted messages that occurred after the shoot down. A communication to Hernandez from Cuban officials stated, "We have dealt the Miami right a hard blow in which your role has been decisive." One from Hernandez stated, "That the operation to which

we contributed a grain of salt ended successfully.” Third, the head of the Directorate of Intelligence recognized Hernandez “[f]or outstanding results achieved on the job, during the provocations carried out by the government ... this past 24th of February.”

## II. DISCUSSION

Hernandez was convicted of conspiring with the Cuban Government to commit murder in violation of 18 U.S.C. § 1117, which, inter alia, makes it a crime to conspire to violate 18 U.S.C. § 1111. Section 1111 states “(a) Murder is the unlawful killing of a human being with malice aforethought.”<sup>2</sup>

To obtain a conviction for conspiracy, the Government must prove beyond a reasonable doubt: (1) an agreement by two or more persons to achieve an unlawful objective; (2) the defendant’s knowing and voluntary participation in the agreement; and (3) an overt act committed in furtherance of the conspiracy. *See United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir.1998) (emphasis added). The evidence must establish a common agreement to violate the law. *United States v. Parker*, 839 F.2d 1473, 1478 (11th Cir.1988). The defendant need not know that the conduct is unlawful, but the conspirators must agree to commit unlawful conduct. *United States v. Feola*, 420 U.S. 671, 687, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). Such an agreement may be proven with circumstantial evidence, but

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<sup>2</sup> Subsection (b) of that statute states both the jurisdictional requirement and the punishment for violations of subsection (a).

inferences are only permitted when "human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts." *United States v. Villegas*, 911 F.2d 623, 628 (11th Cir.1990). "[C]harges of conspiracy are not to be made out by piling inference upon inference." *Ingram v. United States*, 360 U.S. 672, 680, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959). "[T]he ultimate burden on the government is the ability to draw a reasonable inference, and not a speculation, of guilt." *Villegas*, 911 F.2d at 628. Knowledge of the criminal act "must be clear, not equivocal." See *Ingram*, 360 U.S. at 678-80, 79 S.Ct. 1314.

Furthermore, "parties must have agreed to commit an act that is itself illegal-parties cannot be found guilty of conspiring to commit an act that is not itself against the law." *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir.1999). Also, the language in the substantive offense-Section 1111-states that "[m]urder is the *unlawful* killing ..." (emphasis added). And conspiracy to commit a particular offense "cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram*, 360 U.S. at 680, 79 S.Ct. 1314.

A country cannot lawfully shoot down aircraft in international airspace, in contrast to a country shooting down foreign aircraft within its own territory when the pilots of those aircraft are repeatedly warned to respect territorial boundaries, have dropped objects over the territory, and when the objective of the flights is to destabilize the country's political system. Thus, the question of whether the Government provided sufficient evidence to support Hernandez's conviction turns on whether it presented

sufficient evidence to prove that he entered into an agreement to shoot down the planes in international, as opposed to Cuban, airspace.

The majority opinion discusses the airspace issue, but it does so in the context of a different analytical framework: whether the *mens rea* requirement in subsection (a) of Section 1111 carries over to subsection (b). The opinion fails to address, however, whether the Government produced sufficient evidence to prove beyond a reasonable doubt that Hernandez agreed to commit an unlawful act. Such a discussion is necessary because our conspiracy law requires that those entering into a conspiracy have an agreement to commit an unlawful act and the substantive murder offense requires that the killing be unlawful. A shoot down in Cuban airspace would not have been unlawful; thus, Hernandez could not have been convicted of conspiracy to murder unless the Government proved beyond a reasonable doubt that he agreed for the shoot down to occur in international, as opposed to Cuban, airspace.<sup>3</sup>

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<sup>3</sup> The majority opinion relies heavily on *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). In that case, Feola was convicted of assaulting federal officers and conspiring to assault federal officers. *Id.* at 674, 95 S.Ct. 1255. On appeal, Feola argued that while he and his co-conspirators agreed to an assault, they did not know that the victims of that assault were federal officers, and that, to sustain his conviction, the Government had to show that he knew those victims were federal officers. *Id.* at 674-77, 95 S.Ct. 1255. The Court disagreed. It concluded that the Government did not

Here, the Government failed to provide sufficient evidence that Hernandez entered into an agreement to shoot down the planes at all. None of the intercepted communications the Government provided at trial show an agreement to shoot down the planes. At best, the evidence shows an agreement to "confront" BTTR planes. But a "confrontation" does not necessarily mean a shoot down. BTTR's

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need to show that Feola knew that his victims were federal officers: the Government needed only to demonstrate that Feola had the intent to assault (for the substantive offense) and agreed to the assault (for the conspiracy offense). *Id.* at 684-85, 694-96, 95 S.Ct. 1255.

Thus, the *Feola* opinion states that the *mens rea* required in the non-jurisdictional elements of an offense do not apply to the jurisdictional element as well. I agree that *Feola* controls here for the limited purpose of the *mens rea* analysis: the Government did not need to prove that Hernandez knew the shoot down would occur in international airspace within this framework because the *mens rea* in § 1111(a) is not imputed to § 1111(b). But where I disagree with the majority opinion is that I do not think the analysis stops there. The first element of conspiracy requires an agreement to commit an unlawful act, and the underlying murder statute requires that the killing be "unlawful." Within these two analytical frameworks, which are separate and distinct from the *mens rea* framework, the Government must show that Hernandez agreed to an unlawful killing—that he agreed to a shoot down in international, as opposed to Cuban, airspace. As discussed below, because there is no evidence that Hernandez agreed to such a shoot down, I dissent.



videotape on January 9th clearly shows that BTTR members seriously contemplated that MiGs would "confront" them by forcing them to land. Richard Nuccio-an advisor to President Clinton on Cuban affairs-also thought BTTR's repeated violations of Cuban airspace would result in a forced landing. He testified (and documents show) that conversations within the State Department suggested the same. *Id.* And Basulto testified that on the day of the shoot down he thought MiGs would fire warning shots. This evidence demonstrates the obvious: there are many ways a country could "confront" foreign aircraft. Forced landings, warning shots, and forced escorted journeys out of a country's territorial airspace are among them-as are shoot downs. But the Government presented no evidence that when Hernandez agreed to help "confront" BTTR that the agreed confrontation would be a shoot down.<sup>4</sup> To

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<sup>4</sup> The majority states that the fact that the Directorate of Intelligence did not want agents flying with BTTR on certain days shows that Hernandez knew a shoot down was going to occur. This argument assumes that the Directorate of Intelligence believed "confrontations" other than shoot downs are safe for those on board. It is just as reasonable to conclude that the Directorate of Intelligence did not want its agents flying on those days because of the dangers inherent in any confrontation involving airplanes. (Indeed, Nuccio testified that he feared a forced landing would result in a crash.) Because so much evidence points toward a "confrontation" other than a shoot down, I cannot say that a reasonable jury-given all the evidence-could conclude beyond a reasonable doubt that Hernandez agreed to a shoot down.

conclude that the evidence does show this goes beyond mere inferences to the realm of speculation.

Moreover, even assuming that Hernandez agreed to help Cuba shoot down the BTTR planes, the Government presented no evidence that Hernandez agreed to a shoot down in international airspace. It is not enough for the Government to show that a shoot down merely *occurred* in international airspace: the Government must prove beyond a reasonable doubt that Hernandez *agreed* to a shoot down in international airspace. Although such an agreement may be proven with circumstantial evidence, here, the Government failed to provide either direct or circumstantial evidence that Hernandez agreed to a shoot down in international airspace. Instead, the evidence points toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act.

Basulto testified that in his nearly 2000 BTTR flights, MiGs never confronted him in international airspace. Further, every communication between Cuba and the FAA discussed the consequences for invading Cuba's sovereign territory, including the letter Cuba sent on January 15th-only a month before the tragic events of February 24th. The evidence also shows that American officials at the White House and in the State Department never contemplated a confrontation in international airspace. And the intercepted communications between Cuba and Hernandez speak of a confrontation only if BTTR "provokes" Cuba. Further, the fact that the intercepted communications after the shoot down show that Hernandez was congratulated for his role and that he acknowledged

participation and called it a "success" does not clearly establish an agreement to a shoot down in international airspace.<sup>5</sup> The Government cannot point to *any evidence* that indicates Hernandez agreed to a shoot down in international, as opposed to Cuban, airspace.

At most, the evidence demonstrates that Hernandez agreed to a confrontation in either Cuban or international airspace. But such an agreement is not enough to sustain a conspiracy conviction. See *United States v. Fernandez*, 892 F.2d 976, 986 (11th Cir.1990) (where discussion between alleged co-conspirators was susceptible to "either an illegal or legal interpretation," evidence that the conversation occurred is insufficient to meet the Government's burden to establish the unlawful-objective element of criminal conspiracy); *United States v. Wieschenberg*, 604 F.2d 326, 335-36 (5th Cir.1979) ("mere association of two or more persons to accomplish legal and possibly illegal goals, accompanied by discussions to promote those goals, but with no discernible direction toward either the legal or the illegal objectives" cannot support a conspiracy conviction).<sup>6</sup>

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<sup>5</sup> The majority focuses on Hernandez's referring to the incident as a "success." The fact that a spy refers to a shoot down of a perceived enemy plane as a "success" is not evidence that the spy agreed to help shoot down the plane in international, as opposed to Cuban, airspace.

<sup>6</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth

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I would therefore affirm Hernandez's convictions and sentences on Counts 1, 2, 4, 5, 6, 15, 16, 19, 22, 23, and 24, but I would reverse the conviction and sentence with regard to Count 3, conspiring to commit murder in violation of 18 U.S.C. § 1117.

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Circuit handed down prior to close of business on September 30, 1981.

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UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

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No. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY,  
A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A.  
ISELIN, A.K.A. CASTOR, GERARDO HERNANDEZ, A.K.A.  
GIRO, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE 1,  
A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A. OSO,  
A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2,  
ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ,  
A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL  
VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL  
VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY,  
A.K.A. ALLAN, A.K.A. JOHN DOE 2, RENE GONZALEZ,  
A.K.A. ISELIN, A.K.A. CASTOR, ANTONIO GUERRERO,  
A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT,  
RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A.  
CAMILO, A.K.A. OSCAR, DEFENDANTS-APPELLANTS.

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[Decided: Aug. 9, 2006  
Filed: Aug. 9, 2006]

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Before: EDMONDSON, Chief Judge, and TJOFLAT,  
BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL,  
MARCUS, WILSON, PRYOR and KRAVITCH,\* Circuit  
Judges.

## OPINION

WILSON, Circuit Judge:

This case involves the Miami trial and conviction of five defendants for acting and conspiring to act as unregistered Cuban intelligence agents working within the United States and for conspiring to commit murder. The defendants, Ruben Campa, Rene Gonzalez, Gerardo Hernandez, Luis Medina, and Antonio Guerrero, appealed their convictions and sentences, arguing that the pervasive community prejudice against the Cuban government and its agents and the publicity surrounding the trial that existed in Miami prevented them from obtaining a fair and impartial trial. We reviewed this case en banc to determine whether the district court abused

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\* Senior Circuit Judge Kravitch elected to participate in this decision pursuant to 28 U.S.C. § 46(c).



its discretion when it denied their multiple motions for change of venue and for new trial. We now affirm.<sup>1</sup>

## I. BACKGROUND

### A. *The Indictments*

On September 12, 1998, the five defendants were arrested, and were subsequently indicted on October 2, 1998, for acting and conspiring to act as agents of the Republic of Cuba without prior notification to the Attorney General of the United States in violation of 18 U.S.C. §§ 951(a) and 2 and 28 C.F.R. § 73.1 et seq., and of defrauding the United States concerning its governmental functions, in violation of 18 U.S.C. § 371.<sup>2</sup> The indictment alleged:

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<sup>1</sup> The defendants raised the following additional issues on appeal: prosecutorial misconduct regarding the testimony of a government witness and during closing argument; improper use of the Classified Information Procedures Act; improper denial of a motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act; *Batson* violations; insufficiency of the evidence regarding the conspiracy to transmit national defense information to Cuba, violations of the Foreign Services Registration Act, and conspiracy to commit murder; improper denial of a motion to dismiss Count 3 based on Foreign Sovereign Immunities Act jurisdictional grounds; improper denial of jury instructions regarding specific intent, necessity, and justification; and sentencing errors. We remand this case to the panel for consideration of these outstanding issues.

<sup>2</sup> R1-224. The government filed a second superceding indictment on May 7, 1999. *Id.*

[The defendants] function[ed] as covert spies serving the interests of the government of the Republic of Cuba within the United States by gathering and transmitting information to the Cuban government concerning United States military installations, government functions and private political activity; by infiltrating, informing on and manipulating anti-Castro Cuban political groups in Miami-Dade County; by sowing disinformation within these political groups and in dealings with United States private and public institutions; and by carrying out other operational directives of the Cuban government.<sup>3</sup>

Hernandez, Medina, and Guerrero were also charged with conspiring to deliver to Cuba "information relating to the national defense of the United States, ... intending and having reason to believe that the [information] would be used to the injury of the United States and to the advantage of [Cuba]," in violation of 18 U.S.C. §§ 794(a), (c), and 2.<sup>4</sup> Hernandez was also indicted for conspiracy to perpetrate murder in the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. §§ 1111 and 2, in connection with the Cuban military's shootdown of two United States-registered civilian aircraft on February 24,

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<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> *Id.* at 11-13.

1996, in violation of 18 U.S.C. §§ 1117 and 2.<sup>5</sup> Hernandez, Medina, and Campa were indicted for possession of a counterfeit United States passport, in violation of 18 U.S.C. §§ 1546(a) and 2, and possession of fraudulent identification documents in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), (c)(3), and 2.<sup>6</sup> Medina was indicted for making a false statement to obtain a United States passport, in violation of 18 U.S.C. §§ 1542 and 2.<sup>7</sup> Hernandez, Medina, and Campa were indicted for causing individuals they oversaw to act as unregistered foreign agents without prior notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 and 28 C.F.R. § 73.1 et seq.<sup>8</sup> Their trial was set to proceed in the Southern District of Florida in Miami.

Shortly after the indictments were returned and upon the government's motion, on October 20, 1998, the court entered a gag order ordering all parties and their attorneys to abide by Southern District of Florida Local Rule 77.2.<sup>9</sup> The parties and their attorneys were ordered to "refrain from releasing 'information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation' where 'such dissemination will interfere with a fair trial or

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<sup>5</sup> *Id.* at 13-16.

<sup>6</sup> *Id.* at 16-22.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.* at 23-31.

<sup>9</sup> 2SR1-122 at 1.

otherwise prejudice the due administration of justice.”<sup>10</sup>

*B. Pretrial Change of Venue Motions*

On August 16, 1999, Medina filed a motion for authorization of funds to conduct a survey of the Miami-Dade County community, as a predicate for a motion for change of venue.<sup>11</sup> Medina requested authorization to engage Florida International University Psychology Professor Gary Patrick Moran for \$9,500 to conduct a poll of a representative sample of the population of Miami-Dade County to determine whether it was a fair venue for the trial.<sup>12</sup> Moran proposed a “standard” telephone poll of 300 people.<sup>13</sup> The district court granted Medina’s motion.<sup>14</sup>

In January of 2000, Campa, Gonzalez, Guerrero, and Medina each moved for a change of venue out of the Southern District of Florida.<sup>15</sup> They argued that they would be denied due process and a fair trial with an impartial jury as a result of the pervasive community prejudice in Miami against anyone associated with the Cuban government.<sup>16</sup> In support

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<sup>10</sup> *Id.* at 1-2 (quoting S.D. Fla. L.R. 77.2(A)(1)).

<sup>11</sup> R1-275.

<sup>12</sup> R1-280 at 3.

<sup>13</sup> *Id.*

<sup>14</sup> R2-303.

<sup>15</sup> R2-317, 321, 324, 329, 334; R3-397, 455.

<sup>16</sup> *See Id.* Later, at oral argument on the motions, they agreed that they would be satisfied with a

of their motions, they submitted the results of Professor Moran's survey and numerous news articles.<sup>17</sup>

Moran's survey consisted of 11 opinion and 21 demographic questions designed "to examine prejudice against anyone alleged to have assisted the Castro Cuban government in espionage activities."<sup>18</sup> Focus On Miami, a data collection company located in Miami-Dade County, was retained to conduct the survey by telephone.<sup>19</sup> In Section 1 of the survey, the interviewer made a series of 11 statements and questions regarding the defendants' alleged illegal conduct and general statements about Cuba and Castro to which the respondent was instructed to answer either "agree strongly," "agree," "disagree," "disagree strongly," or "don't know."<sup>20</sup> In Section 2 of the survey, the

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transfer of the case within the Southern District of Florida from the Miami Division to the Fort Lauderdale Division. R5-586 at 2, n.1.

<sup>17</sup> See *Id.*

<sup>18</sup> R2-321, Ex.A at 16.

<sup>19</sup> *Id.* at Ex.C at 1.

<sup>20</sup> *Id.* at Ex.D at 1-3. The interviewer began each survey by stating, "We are conducting a survey of south Florida voters to see how they feel about the upcoming trial of some people charged in federal court with spying for Castro's Cuba. Your house has been randomly selected to provide a participant for this survey." *Id.* at 1. The interviewer then asked whether the interviewee was "aware of the case involving the alleged Cuban spies who were arrested in Miami?" *Id.* The interview then proceeded with

interviewer asked a series of 21 demographic

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Section 1 of the survey, which included the following statements and questions:

1. Cuban born persons carrying false identification documents and engaging in intelligence gathering activities in south Florida are Castro spies.
2. These defendants are charged with setting up the ambush of the Brothers to the Rescue planes in which four people were killed. This type of activity is characteristic of the Castro regime.
3. The aim of Castro is to undermine legitimate Cuban exile organizations.
4. An aim of Castro is to infiltrate U.S. military bases in South Florida.
5. Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades.
6. Castro's Cuba is an enemy of the United States.
7. Castro poses a real threat to the lives of Cuban [sic] exiles.
8. Castro's spies should not be given a public trial if this threatened national security.
9. Because of my feelings and opinions about Castro's government I would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies.
10. You have told me that you would find it (difficult/not difficult) to be a fair and impartial juror. Are there any circumstances that would change your opinion? If so, what?
11. Suppose your jury found these spy defendants not guilty. How worried would you be that you might be criticized in your community?

*Id.* at 2-3.



questions designed to gather information about the respondent's background, lifestyle, media exposure, and involvement in pro- or anti-Cuba groups.<sup>21</sup>

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<sup>21</sup> *Id.* at 3-5. Section 2 of the survey asked the following questions:

12. In what community do you live?
13. What is your zip code?
14. In what country were you born?
15. How long have you lived in South Florida?
16. Do you subscribe to, buy, or read a daily newspaper?
17. If you read a daily newspaper is it in English or Spanish?
18. Do you regularly listen to the news on the radio?
19. If you listen to the news on the radio is it in English or Spanish?
20. Do you regularly watch the news on the television?
21. If you watch the news on television is it in English or Spanish?
22. Do you have close friends or family members in Cuba now?
23. Are you an active member of any Pro-Cuba/Anti-Castro groups?
24. Do you donate money to Pro-Cuba/Anti-Castro groups or causes?
25. What is (was) your occupation?
26. What is your age today?
27. What is your marital status today? ...
28. What is the highest level of education that you have COMPLETED? ...

According to Professor Moran, the results of the survey indicated that 69% (with a sampling error of 5.3%) of eligible jurors were prejudiced.<sup>22</sup> Around 40% of the respondents (60% of the Hispanic respondents) “indicate[d] that they would find it difficult to be impartial.”<sup>23</sup> Around 90% “would not change their minds under any circumstances.”<sup>24</sup> Finally, approximately one-third of the respondents were “at least somewhat worried about community criticism in the event of a ‘not guilty’ verdict.”<sup>25</sup> Based on these results, Professor Moran concluded the following:

I conclude ... to a reasonable scientific certitude that a change of venue from the Miami Division of the Southern Federal District of Florida is the only viable means of assuring the defendant a fair and impartial jury. The results of the survey suggest that a jury chosen from the District

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29. Aside from the political party with which you are registered, how would you describe your current political views or beliefs? ...

30. Which [ethnicity] best describes your background? ...

31. Which [monetary range] best describes your total household annual income ....

32. Respondent's sex.

*Id.*

<sup>22</sup> *Id.* at Ex.A at 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

will hold firm opinions prejudicial to this defendant that cannot be put aside. A reasonable likelihood of prejudice endangering the right to a fair trial exists.<sup>26</sup>

Moran further noted that two prior surveys from the early 1980's and from 1997, which also evaluated the Southern District of Florida, reached similar conclusions.<sup>27</sup> According to Moran, this suggested that prejudicial opinions in the Southern District of Florida were "fixed" and "[could not] be set aside."<sup>28</sup>

In addition to Moran's survey, the defendants also submitted numerous newspaper articles on their case and other Cuba-related issues.<sup>29</sup> They argued that these articles demonstrated that the community atmosphere is "so pervasively inflamed" that "resort to questioning in the cool reflection of a courtroom is not sufficient to cleanse the record."<sup>30</sup>

The government opposed the defendants' change of venue motion and maintained that an extensive voir dire of prospective jurors would ensure a fair and impartial jury.<sup>31</sup> It disputed that pervasive community prejudice existed and instead argued that the Miami-Dade population was "heterogenous" and "highly diverse."<sup>32</sup> It further noted that many of the

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8-11, 16.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> R2-317, 321, 324, 329, 334; R3-397, 455.

<sup>30</sup> R2-317 at 3.

<sup>31</sup> R3-443 at 3.

<sup>32</sup> *Id.* at 11.

news articles that the defendants submitted either did not relate to the instant case, or were accurate, objective, and unemotional.<sup>33</sup> The news coverage “pale[d] in comparison” with the biased coverage and sensationalism found in the rare cases in which previous courts had found presumed prejudice.<sup>34</sup>

The government further argued that Professor Moran’s survey was unreliable due to numerous flaws in his procedures and conclusions.<sup>35</sup> In particular, it disputed Professor Moran’s reliance on the two surveys that were used in prior, unrelated cases, which concluded that a substantial prejudice existed in the Southern District of Florida against defendants alleged to have helped the Castro government.<sup>36</sup> The first was the survey put forth in support of an unsuccessful change of venue motion in *United States v. Fuentes-Coba*,<sup>37</sup> a case involving illegal shipments of goods in violation of the Trading with the Enemy Act. We affirmed the district court’s refusal to change venue, after the court reviewed the survey, determined no pervasive community prejudice had been shown, and conducted a thorough voir dire, thus ensuring a fair and impartial jury.<sup>38</sup> The government argued here that the court should follow this course of action by proceeding to voir dire

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<sup>33</sup> *Id.* at 5, n. 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 6-12.

<sup>36</sup> *Id.* at 6-9.

<sup>37</sup> 738 F.2d 1191, 1194 (11th Cir.1984).

<sup>38</sup> *Id.* at 1195.

to explore any potential jury bias.<sup>39</sup> The second survey that Moran relied on was the one he designed for *United States v. Broder*,<sup>40</sup> another Trading with the Enemy Act case involving Cuba in which the district court denied the defendants' motion for change of venue. One of the *Broder* defendants proceeded to trial and was acquitted of all charges, disproving Moran's conclusion that the Miami-Dade jury pool was hopelessly prejudiced against defendants charged with associating with Castro's Cuba.<sup>41</sup> In other words, the government argued that the very surveys which Moran relied upon in the instant case discredited his theory and instead demonstrated that Miami-Dade jurors would base their verdict on evidence, not prejudices.<sup>42</sup>

The government argued that Moran's survey was not well-designed, did not measure prejudice accurately, and engaged in broad, unsupported characterizations of the South Florida community.<sup>43</sup> For example, the government noted the near-verbatim similarity between Moran's *Broder* survey and affidavit and his survey and affidavit in the present case, suggesting that Moran's conclusions revealed "the foreordained conclusions of a predisposed and partisan expert, who has not even bothered to change the wording of his purportedly

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<sup>39</sup> R3-443 at 7.

<sup>40</sup> No. 97-267 (S.D.Fla.1997).

<sup>41</sup> R3-443 at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 8-9.

scientific results.”<sup>44</sup> Many of \*1131 the questions were ambiguous or were written in non-neutral terms, which demonstrated Moran’s failure to follow scientific procedures.<sup>45</sup> To further support its position, the government submitted the affidavit and

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<sup>44</sup> *Id.* at 8. The government noted the close similarity between the two surveys and the “echo-like nature” of Moran’s affidavit by referencing the following example. *Id.* In Moran’s 1997 *Broder* affidavit, Moran concluded:

*Inability to be Fair and Impartial*

Finally, note item 14:

“Because of my feelings and opinions about the U.S. trade embargo on Cuba, I would find it difficult to be a fair and impartial juror in a case about an alleged violation of the Cuban embargo.”

Circa 59% of the respondents are unable to agree that they can be impartial. This is very unusual!

*Id.* at Ex.A at 15. By comparison, Moran’s affidavit in the present case uses similar language and structure:

*Inability to be Fair and Impartial*

Finally, note item 9:

“Because of my feelings and opinions about Castro’s government, I would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies.”

Circa 39.6% (57.4% of the Hispanic subsample) of the respondents are unable to affirm that they would be impartial and fair. This is very unusual!

R2-321, Ex.A at 12.

<sup>45</sup> R4-443 at 9-11.



curriculum vitae of Professor J. Daniel McKnight<sup>46</sup> who opined that Professor Moran's *Broder* survey "lack[ed] empirical rigor, scientific validity and provide[d] no estimation of its scientific reliability."<sup>47</sup> Although McKnight's analysis was of the *Broder* survey and affidavit, McKnight's evaluation was germane to the instant case given the striking similarities between two sets of surveys and affidavits.<sup>48</sup>

Following extensive oral argument, on June 27, 2000, the district court denied the defendants' motion without prejudice, finding that they had failed to present sufficient evidence "to raise a presumption of prejudice against [them] as would impair their right to a fair trial by an impartial jury in Miami-Dade County."<sup>49</sup> The court found that most of the news articles related to events other than the defendants' alleged activities, and that except for articles regarding the codefendants' sentences and one editorial noting the Brothers to the Rescue shutdown anniversary, the articles about the shutdown were more than one year old and were largely factual.<sup>50</sup> Accordingly, the court found that

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<sup>46</sup> *Id.* at Ex.B at 1. Professor McKnight is a social psychologist specializing in social perception, research methodology, and psychometrics. *Id.*

<sup>47</sup> *Id.* at Ex. B at 2.

<sup>48</sup> *Id.* at 9.

<sup>49</sup> R5-586 at 16.

<sup>50</sup> *Id.* at 11. Brothers to the Rescue is a Miami-based Cuban exile group founded in 1991 to rescue rafters fleeing Cuba in the Straits of Florida and to bring

pretrial publicity was not sufficiently pervasive and inflammatory to raise a presumption of prejudice.<sup>51</sup>

The court also found Professor Moran's survey and affidavit insufficient to establish pervasive community prejudice for six reasons.<sup>52</sup> The court faulted the survey for: (1) including respondents who were completely unaware of this case in quantifying alleged community prejudice against the defendants; (2) failing to measure prejudice toward a particularized group of people, i.e., a "social target," making prejudice calculations "unreliable" and "without substantial support"; (3) failing to use neutral terminology, contrary to standard scientific procedure; (4) asking ambiguous questions; and (5) using an inadequate sample size, representing only 0.003% of eligible Miami-Dade jurors.<sup>53</sup> "[M]ost significantly," Professor Moran relied on the same study that we rejected in *Fuentes-Coba* to bolster his conclusion that community prejudice existed in

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them to the United States. *See Id.* at 2; R80 at 8836-37. On February 24, 1996, three Brothers to the Rescue planes flew into the Florida Straits, toward Cuba, in search of reported rafters. R83 at 9161-70. When the three planes reached international airspace between the United States and Cuba, Cuban military ground control authorized Cuban aircraft to fire on and destroy the Brothers to the Rescue planes. *Id.* at 9181-85; Govt. Ex. 483 at 8-16. The Cuban military aircraft shot down two of the planes, but one escaped. *Id.*

<sup>51</sup> R5-586 at 11.

<sup>52</sup> *Id.* at 13-15.

<sup>53</sup> *Id.*

Miami-Dade.<sup>54</sup> Under these circumstances, the court was unwilling to afford the survey and Professor Moran's conclusion the weight attributed by the defendants.<sup>55</sup> However, the court promised a thorough voir dire and invited the defendants to renew their motions if voir dire showed "that a fair and impartial jury [could not] be empaneled."<sup>56</sup>

### C. Voir Dire

The case proceeded to voir dire. The court held two status conferences to develop the voir dire questions.<sup>57</sup> Although the defendants stipulated to the government's proposed questions,<sup>58</sup> the parties argued at length regarding the terminology of the

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<sup>54</sup> *Id.* at 15.

<sup>55</sup> *Id.* at 13-14.

<sup>56</sup> *Id.* at 17. On September 15, 2000, Campa moved for reconsideration of the denial of the motion for change of venue, arguing that the court failed to consider how the defendants' theory of defense affected their ability to receive a fair trial in Miami. R5-656. The court denied reconsideration without prejudice, stating that it had previously addressed the defendants' arguments. R6-723 at 2. The court explained that it could explore any potential bias during voir dire examination and carefully instruct the jurors during the trial. *Id.* The court again invited the defendants to renew their motion for change of venue, if it determined after voir dire that a fair and impartial jury could not be empaneled. *Id.* at 2-3.

<sup>57</sup> 1SR1; 1SR2.

<sup>58</sup> 1SR1 at 42.

questions and made suggestions for revisions.<sup>59</sup> The court deliberated extensively and carefully over the questions, keeping in mind the defendants' unsuccessful motions for change of venue: "I promised you all and [e]specially the defendants when I denied your motions for change of venue, that I would consider extensively your request for voir dire ...."<sup>60</sup> Ultimately, the court developed an exhaustive list of questions for a two-phase voir dire.<sup>61</sup> The court noted, "[m]ore questions are being

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<sup>59</sup> 1SR1; 1SR2. One of the most heated debates was whether and how the court should question prospective jurors' support of pro- or anti-Castro political groups, and whether the court should specifically delineate nine of those groups, a question suggested by the defendants. 1SR2 at 63-74; 1SR1 at 48-55. Over the government's objection that such a question improperly implied an association between the Brothers to the Rescue and other historically violent groups, the court decided to include the question. 1SR1 at 51-54. Another debate centered around whether and how the court should question prospective jurors who formerly lived in Cuba regarding how they came to live in the United States. 1SR1 at 29-36. The defendants suggested that the court ask whether they had an exit visa because those who left Cuba illegally would have a different outlook on the case than those who left the country legally. 1SR1 at 29-30, 35. The government objected, arguing that such questions would make the prospective jurors feel extremely uncomfortable, but the court decided to ask the question anyway. 1SR1 at 32-33, 35.

<sup>60</sup> 1SR2 at 73-74.

<sup>61</sup> 1SR1 at 5.

asked of this jury as far as their background than questions that are ever asked or have been asked of jurors that certainly have appeared before me in cases; but I have agreed that this is a case that requires additional inquiry and certainly there is additional inquiry here ....<sup>62</sup>

Phase one would consist of the general questioning of the voir dire, which was aimed at determining the jurors' qualifications to serve in the case.<sup>63</sup> During this phase, panels of approximately 34 prospective jurors would be in the courtroom at a time.<sup>64</sup> The court would ask the group a set of 16 general questions, and then each juror would read aloud to the court their answers to a 28-question written questionnaire.<sup>65</sup> It would ask additional, follow-up questions when necessary.<sup>66</sup> The court rejected the parties' requests for attorney-conducted voir dire, and determined that it would ask all of the questions during both phases of the voir dire.<sup>67</sup> The court did, however, promise to inquire whether there were any additional questions that the parties wished the court to ask any individual juror, or the panel as a whole, after the completion of the general questions and the questionnaires.<sup>68</sup> The parties would

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<sup>62</sup> 1SR1 at 29.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 9.

<sup>65</sup> *Id.* at 5; R6-766.

<sup>66</sup> 1SR1 at 5.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.*

then exercise challenges for cause and hardship for each panel.<sup>69</sup>

Once the court had questioned several venire panels of 34 prospective jurors, it would proceed to phase two with the remaining jurors who had not been challenged for cause or for hardship.<sup>70</sup> During phase two, small groups of approximately ten jurors would be instructed to be present in the lobby of the courtroom at staggered times throughout the day, and one-by-one the jurors would enter the courtroom for individual questioning.<sup>71</sup> The court would individually pose a set of 20 "community impact" questions<sup>72</sup> and 7 "pretrial publicity" questions<sup>73</sup> to

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<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 7.

<sup>72</sup> The "community impact" questions consisted of the following:

1. The charges in this case include allegations that the defendants were agents acting on behalf of the Republic of Cuba. Is there anything about that proposition that would affect your ability fairly and impartially to consider the evidence in this case and the court's instructions?

2. Witnesses may be called in this case who have admitted to spying as agents for Cuba or who are members of the Cuban military or government. Would you automatically disbelieve such a witness regardless of their testimony or without comparing it with other witnesses or physical evidence in this case?

3. Do you know of any reason why you may be prejudiced for or against the United States or the



defendants because of the nature of the charges? Or because of any other reason?

4. Have you ever lived in Cuba? Under what circumstances did you come to the United States? When did you leave? Did you have an exit visa?

5. Have any of your family members or close friends lived in Cuba? Under what circumstances did they come to the United States?

6. Do you have family or close friends living in Cuba at this time?

7. Do you have any relatives or close friends who were ever politically involved in Cuba? When? What did they do?

8. Have you, a member of your family, or a close friend traveled to Cuba?

9. If you are chosen as a juror in this case, would you be concerned about returning a verdict of guilty or not guilty because of how other members of *your* community might view you?

10. Can you return a verdict in this case based only on the evidence and the court's instructions, without being concerned over the impact the verdict might have on any individuals or community, in the United States, in Cuba, or anywhere?

11. Do you have an opinion about the current government of Cuba? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind?

12. Do you have an opinion about the way the United States handles its relations with Cuba? (for example the embargo against Cuba, the immigration policy or diplomatic relations) What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's

instructions in this case fairly and with an open mind?

13. Are you or a relative or close friend a member of a group whose principal purpose is to advocate a position about Cuba or American policy towards Cuba? What group? Have you ever contributed money or time to this group?

14. Have you contributed money or time or do you support any of the following groups:

P.U.N.D.

Antonio Maceo Brigade

Alpha 66

Cuban Workers Alliance

Omega 7

Miami Committee for Lifting the Cuban Embargo

The Democracy Movement

Brothers to the Rescue

Cuban American National Foundation

15. Do you have an opinion about the Cuban exile community in the United States? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind?

16. Do you have an opinion about the Elian Gonzalez case? What is that opinion? How strong is that opinion? Will that opinion affect your ability to weigh the evidence and the court's instructions in this case fairly and with an open mind? Do you understand that the facts in that case have nothing to do with the facts in this case?

17. As a result of the Elian Gonzalez matter, certain members of the South Florida community, including

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some elected officials, publicly voiced their displeasure with the United States government's actions in that case. Will those statements, or your own feelings about the case, affect your ability to give either the defendants or the United States a fair trial in this case? If so, how?

18. Can you listen to and fairly evaluate the testimony of an individual who is or was closely allied with the current government of Cuba? Or who perhaps is or was a member of the communist party in Cuba?

19. If you have negative feelings about any of these issues, can you put those feelings aside and decide this case based on the evidence presented and the instructions of law as given by the court?

20. If you were the United States Attorney prosecuting this case, or if you were any of the defendants, or their counsel, do you know of any reason why you should not select yourself as a juror?

Gov't Br. at App. G.

<sup>73</sup> The "pretrial publicity" questions consisted of the following:

1. What do you remember hearing, reading or seeing about this case in the news media?
2. What was the source of the information? Which newspaper/radio station/tv station[?]
3. Has anyone ever talked to you about the facts of this case? What additional information did you get from this source?
4. Based on what you have heard or seen, have you formed any opinion as to whether the defendants are guilty or not guilty? What is that opinion? Have you ever expressed an opinion as to the guilt or non-guilt of the defendants? To whom?

each juror. These questions centered around more sensitive subjects, such as the jurors' media exposure, knowledge and opinions of the case, connections to Cuba, the United States policy toward Cuba, and the Cuban exile community in the United States.<sup>74</sup> After the individual questioning, the parties would be permitted to exercise additional challenges for cause and hardship, if there were any, and peremptory challenges.<sup>75</sup>

On November 27, 2000, the trial began, and the voir dire proceeded as planned.<sup>76</sup> During phase one, the court questioned 168 jurors through the oral voir

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5. A jury in a criminal case must base its verdict solely on the evidence presented at trial, and the instructions provided by the Court. Can you put whatever statements you may have seen, heard or read out of your mind, and consider this case with an open mind, based solely on the evidence presented at trial and the instructions provided by the Court?

6. Jurors in this case will be instructed that they must not read, listen to or otherwise allow themselves to be exposed to any information, news reports, or public or private discussions about this case, unless and until they have been permanently discharged by Judge Lenard from serving on the jury. Will you be able to follow such an instruction?

7. If you are chosen as a juror in this case will you be able to return a verdict of guilty or not guilty unaffected by the possibility that any verdict would receive news media attention?

*Id.*

<sup>74</sup> *See Id.*

<sup>75</sup> 1SR1 at 7.

<sup>76</sup> *See* R21.

dire and the written questionnaire to screen for language, hardship, and scheduling problems.<sup>77</sup> The court questioned whether the jurors knew any of the parties, attorneys, or witnesses in the case, and questioned the jurors on their ability to reach a verdict based solely on the evidence and the court's instructions.<sup>78</sup> Based on these generalized questions, the court struck 49 jurors for cause; 10 due to the court's concern over their ability to be fair and impartial because of their opinions regarding Cuba or their acquaintance with persons involved in the case, and the remaining 39 for hardship, health, or language problems.<sup>79</sup>

In phase two, the court individually questioned 82 prospective jurors.<sup>80</sup> Jurors who had heard media accounts about the case were asked to provide details regarding their exposure.<sup>81</sup> The court asked probing questions to potential jury members who acknowledged having opinions about Cuba to determine whether those opinions would affect their ability to weigh the evidence and follow the court's instructions.<sup>82</sup> As promised, the court asked additional, follow-up questions *sua sponte* and when the parties requested.<sup>83</sup> At the conclusion of phase

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<sup>77</sup> R21-R24.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> R25-28.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

two, the court struck an additional 30 potential jurors for cause: 22 were struck for Cuba-related animus and the remaining 8 were dismissed for reasons unrelated to attitudes about Cuba or the defendants.<sup>84</sup>

The court and the parties then proceeded to peremptory challenges. The court twice granted the defendants' requests for additional peremptory challenges, giving the defendants a total of 18 and the government 11, and 2 each for alternates.<sup>85</sup> However, the defendants exercised only 15 of their 18 challenges to the jury pool, as well as their two allotted alternate challenges, to excuse jurors whose answers revealed biases against them.<sup>86</sup> The defendants struck every Cuban-American prospective juror, notwithstanding the government's reverse-Batson objection.<sup>87</sup>

The voir dire lasted seven days. On each day of the voir dire, before every recess, and at the end of every day, the court admonished prospective jurors not to discuss the case amongst themselves or with others, not to have contact with anyone associated with the trial, and not to expose themselves, read, or listen to anything related to the case.<sup>88</sup>

During the lunch break on the first day of voir dire, the court observed that the family members of

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<sup>84</sup> *Id.*

<sup>85</sup> 1SR2 at 75; 1SR1 at 5-6, 11; R27 at 1382.

<sup>86</sup> R28 at 1513.

<sup>87</sup> *Id.* at 1508-11.

<sup>88</sup> See R21-28.



the victims of the Brothers to the Rescue shootdown were congregated in front of the press, immediately outside the courthouse.<sup>89</sup> The family members' statements were "fairly innocuous" in that they merely commented that "they were looking forward to the jury process going forward."<sup>90</sup> Some of the jurors were approached by the media as they were leaving the courthouse,<sup>91</sup> but they were not interviewed.<sup>92</sup> Regardless, the court instructed that it would no longer permit the victims' families to be present during voir dire "if there are efforts made to pollute the jury pool"<sup>93</sup> and instructed the government to speak to the victims' families regarding their conduct.<sup>94</sup> The court entered a sequestration order precluding witnesses from speaking with each other and with the media about the case.<sup>95</sup> It also extended the gag order to "all [trial] participants, lawyers, witnesses, family members of the victims" and clarified that it covered all "statements or information which is intended to influence public opinion or the jury regarding the merits of the case."<sup>96</sup> The court thereafter instructed the jurors to remove their juror tags as they left the

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<sup>89</sup> R7-978 at 3.

<sup>90</sup> R23 at 194.

<sup>91</sup> R21 at 111-12; R62 at 6575-76.

<sup>92</sup> R23 at 194.

<sup>93</sup> R21 at 113.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 117-19.

<sup>96</sup> R7-978 at 3, 7; R64 at 6759-60.

courtroom, and instructed the marshals to accompany the jurors out of the building.<sup>97</sup> The court sealed the voir dire questions during the jury selection so as to prevent the media from accessing them.<sup>98</sup>

Later that day, when a copy of the Miami Herald, which contained an article about the case, was found in the jury assembly room, the court ordered the newspaper removed.<sup>99</sup> The following day, Guerrero's counsel reported that he had viewed one of the potential jurors reading the article while in the courtroom.<sup>100</sup> The district court responded that "[t]he issue is not whether [venire] persons have read or been exposed to publicity about the case of the defendants, but whether they have formed an opinion based upon what they have read. We will go into all of this as we go through individual voir dieres."<sup>101</sup> Later, a potential juror who evidenced prejudice was isolated and removed from the venire so as to eliminate contact with other potential jurors.<sup>102</sup>

The court also issued assigned seating in the courtroom.<sup>103</sup> The government agents were assigned

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<sup>97</sup> R21 at 112.

<sup>98</sup> R24 at 625-26.

<sup>99</sup> R21 at 171.

<sup>100</sup> R23 at 195-97. This juror was later stricken for cause as a result of his personal knowledge of Jose Basulto, a Brothers to the Rescue pilot and witness in this case. R24 at 537-40.

<sup>101</sup> R23 at 197.

<sup>102</sup> *Id.* at 300-10.

<sup>103</sup> R25 at 717.

to the first row, the victims' families were seated in the second row and were removed from the government attorneys, the defendants' families were seated in the third row, and the back row was designated for the media.<sup>104</sup>

At the conclusion of voir dire, the district court empaneled the jury without objection.<sup>105</sup> The defendants did not renew their motions for change of venue, despite the court's prior invitations.<sup>106</sup> Instead, Medina's counsel complimented the manner in which the court conducted the voir dire stating, "The Court's conduct of this voir dire both in terms of its planning and its execution has been extraordinary. What we have accomplished here in the last seven days or six days has been more than I think the defense anticipated we would be able to do."<sup>107</sup> He added, "quite frankly, if Professor Moran could interrogate his pool members the way this Court has interrogated some of the prospective jurors, the social sciences wouldn't be soft sciences, they would be hard sciences."<sup>108</sup> He admitted, "[g]enerally ... the people who prejudged or who had strong opinions were candid about them."<sup>109</sup> Later in the trial, when faced with the prospect of a juror being dismissed due to scheduling problems, the defendants vigorously

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<sup>104</sup> *Id.*

<sup>105</sup> R29 at 1564.

<sup>106</sup> R5-586 at 17; R6-723 at 2-3.

<sup>107</sup> R27 at 1373.

<sup>108</sup> *Id.* at 1374.

<sup>109</sup> *Id.* at 1375.

objected without even knowing the juror's identity.<sup>110</sup> The court retained the juror at the defendants' insistence.<sup>111</sup> The defendants reiterated their satisfaction with the voir dire stating, "[w]e worked very hard to pick this jury and we got a jury we are very happy with."<sup>112</sup>

#### *D. The Trial*

At trial, the government presented evidence<sup>113</sup> that revealed that the Directorate of Intelligence, Cuba's primary intelligence collection agency, maintained a spy operation in South Florida known as "La Red Avispa," or the "The Wasp Network."<sup>114</sup> Campa, Hernandez, and Medina were illegal intelligence officers of the operation and supervised agents, including agents Gonzalez and Guerrero.<sup>115</sup> The Wasp Network reported information to Cuba on the activities of anti-Castro organizations in Miami-Dade County,<sup>116</sup> the operation of United States military installations,<sup>117</sup> and United States political

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<sup>110</sup> R104 at 12094.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 12092.

<sup>113</sup> The original panel of this court will consider the remaining issues on appeal, including whether the government presented sufficient evidence to support the defendants' convictions. This brief discussion of the evidence is only meant to aid in the discussion of the change of venue and new trial issues.

<sup>114</sup> R44 at 3703-07.

<sup>115</sup> *Id.* at 3711-13, 3719-23.

<sup>116</sup> R45 at 3870-71.

<sup>117</sup> R74 at 7910, 7920-21; R46 at 4009-10.

and law enforcement activities.<sup>118</sup> The operation was also directed to intimidate Cuban-American individuals and organizations with anonymous letters and threatening telephone calls;<sup>119</sup> to penetrate United States Congressional election activity;<sup>120</sup> to scout and assess potential sources of information and possible new recruits;<sup>121</sup> and to carry communications, cash, and other items between Miami and other United States-based Directorate of Intelligence officers and agents.<sup>122</sup> None of the defendants notified the United States Attorney General that they were acting as agents of the Cuban government.<sup>123</sup>

During the defendants' case, Hernandez called as a hostile witness Jose Basulto, founder of Brothers to the Rescue and the pilot of the only plane that escaped the February, 24, 1996, shootdown.<sup>124</sup> After a series of questions about Basulto's travel outside of the United States, in which Hernandez's counsel suggested that Basulto had attempted to smuggle weapons into Cuba,<sup>125</sup> Basulto retorted, "Are you doing the work of the intelligence government of

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<sup>118</sup> R103 at 11907-08, 11911-13.

<sup>119</sup> R45 at 3793-99.

<sup>120</sup> Govt. Ex. HF 143.

<sup>121</sup> Govt. Exs. DG 141 at 6-7; DAV 118 at 14-19.

<sup>122</sup> Govt. Exs. 384, 865.

<sup>123</sup> R61 at 6404-15.

<sup>124</sup> R80 at 8836-37.

<sup>125</sup> R81 at 8944-45.

Cuba [?]"<sup>126</sup> Campa's attorney argued that Basulto's insinuation was "precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue ...."<sup>127</sup> He argued, "This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is doing his job, of being a communist .... These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community ... are going to ... accuse them of being Castro sympathizers ...."<sup>128</sup> The court struck Basulto's remark, admonished him, and instructed the jury to disregard the comment, noting that the remark was "inappropriate and unfounded" and that Hernandez's counsel was properly providing "a vigorous defense for his client."<sup>129</sup>

Throughout the trial, the defendants twice renewed their motions for change of venue through motions for a mistrial based on community events and trial publicity.<sup>130</sup> In February 2001, Campa moved for a mistrial based on activities during the weekend of February 24, 2001, to honor the fifth anniversary of the Brothers to the Rescue shootdown, including commemorative flights, as well as television interviews and newspaper articles

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<sup>126</sup> *Id.* at 8945.

<sup>127</sup> *Id.* at 8947.

<sup>128</sup> *Id.* at 8947-48.

<sup>129</sup> *Id.* at 8945-46, 8955.

<sup>130</sup> R70 at 7130-36; R8-1009.



regarding that event.<sup>131</sup> He argued that "some news events ... are so great and are so explosive ... that any amount of instructing the jury cannot cure the taint."<sup>132</sup> The government objected, noting that there was nothing in the record to indicate that the jury had ignored the court's repeated admonitions that they not read or view case-related news accounts.<sup>133</sup> The court granted the defendants' request for a juror inquiry, and asked if any one of them had seen, heard, read, or been spoken to about any media accounts related to this case, seeking a show of hands.<sup>134</sup> The trial continued after no juror responded affirmatively.<sup>135</sup>

On May 24, 2001, the district court denied the pending motions on the basis of its earlier orders

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<sup>131</sup> R70 at 7130.

<sup>132</sup> *Id.* at 7131.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 7136.

<sup>135</sup> *Id.* Two weeks later, on March 1, 2001, the defendants again filed a joint motion for a mistrial and change of venue, arguing that the events surrounding the anniversary of the Brothers to the Rescue shutdown "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial." R8-1009 at 2. They maintained that "[n]o amount of voir dire or instructions to the jury [could] cure the taint, whose ripple effects are difficult to measure." *Id.* at 5. They also requested a mistrial "so that their trial can be conducted in a venue where community prejudices against the defendants are not so deeply embedded and fanned by the local media." *Id.*

denying a change of venue and finding that “the February 24th issues and events as well as the reporting of these events do not necessitate and did not necessitate a change of venue ....”<sup>136</sup> The court noted that “[t]he jurors were instructed each and every day ... at each and every break and at the conclusion of the day ... not to read or listen or see anything reflecting on this matter in any way and there has been no indication that the jurors did not comply with that directive by the Court ....”<sup>137</sup>

During closing arguments, the government commented that Hernandez’s attorney called the Brothers to the Rescue shutdown “the final solution” and noted that such terminology had been “heard ... before in the history of mankind.”<sup>138</sup> It argued that the defendants were “bent on destroying the United States” and were “paid for by the American taxpayer.”<sup>139</sup> It summarized that the defendants had joined a “hostile intelligence bureau ... that sees the United States of America as its prime and main enemy” and that the jury was “not operating under the rule of Cuba, thank God.”<sup>140</sup> The defense objections throughout the closing arguments were sustained.<sup>141</sup> The district court instructed the jury to consider only the evidence admitted during the trial,

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<sup>136</sup> R120 at 13894-95.

<sup>137</sup> *Id.* at 13895.

<sup>138</sup> R124 at 14474.

<sup>139</sup> *Id.* at 14482.

<sup>140</sup> *Id.* at 14475.

<sup>141</sup> *Id.* at 14482, 14483, 14493.

and to remember that the lawyers' comments were not evidence.<sup>142</sup>

For deliberations, the jury was moved to another floor of the courthouse with controlled access.<sup>143</sup> No one but the court staff was permitted on the floor.<sup>144</sup> The court also denied the media's request for the names of the twelve jurors.<sup>145</sup> When the jurors were filmed leaving the courthouse one day during deliberations, the court modified the jurors' entry and their exit from the courthouse to prevent further exposure to the media.<sup>146</sup> The court provided the jurors transportation to and from their vehicles or mass transit and brought them up to their secured floor through the courthouse garage.<sup>147</sup> The jury deliberated for five days.<sup>148</sup> The defendants were convicted on June 8, 2001.<sup>149</sup>

*E. Post-Trial Motions for Change of Venue and for New Trial*

In July and August of 2001, the defendants reasserted their claims of improper venue in post-trial motions for judgment of acquittal and for new trial.<sup>150</sup> They argued a new trial was merited "in the

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<sup>142</sup> R125 at 14583.

<sup>143</sup> R124 at 14546-47; R125 at 14624.

<sup>144</sup> R125 at 14624.

<sup>145</sup> R126 at 14643-44.

<sup>146</sup> *Id.* at 14645-47.

<sup>147</sup> *Id.* at 14647.

<sup>148</sup> R125-R126.

<sup>149</sup> R126 at 14668-69.

<sup>150</sup> R12-1338, 1342, 1343, 1347.

interest of justice" because of the prejudice inured to them from the venue and the prosecution's misconduct.<sup>151</sup> Guerrero argued that, although he did "not seek to criticize the Court's voir dire procedure nor could he," the jurors' responses in voir dire were "politically correct," in that they "all agreed that they would be fair and impartial."<sup>152</sup> Medina similarly argued that, "[d]espite the extraordinary care this Court exercised in the jury selection process," a fair and impartial jury could not be seated in Miami-Dade County.<sup>153</sup> Campa and Gonzalez argued that witness Jose Basulto's remarks were highly prejudicial because they implied that Defendant Hernandez's counsel was a spy for the Cuban government.<sup>154</sup> Campa also asserted that the jury's quick verdicts without asking a single question in the complex, almost seven-month trial indicated that the jury was subject to community pressure and prejudice.<sup>155</sup> He further argued that the government prejudiced the defendants by stating in closing argument that they "were 'people bent on destroying the United States' whose defense had been 'paid for by the American taxpayer.'"<sup>156</sup>

On November 28, 2001, the district court denied the motions for new trial in a detailed written

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<sup>151</sup> R12-1338 at 2-3.

<sup>152</sup> *Id.* at 2.

<sup>153</sup> R12-1347 at 1.

<sup>154</sup> R12-1342 at 3; R12-1343 at 3-4.

<sup>155</sup> R12-1343 at 1-3.

<sup>156</sup> *Id.* at 8.

order.<sup>157</sup> It referenced its prior orders denying a change of venue and denying reconsideration of the denial of the change of venue, and stated that because it was “[a]ware of the impassioned Cuban exile-community residing within this venue, the Court implemented a series of measures to guarantee the Defendants’ right to a fair trial.”<sup>158</sup> These efforts included a searching, seven-day voir dire process, daily instructions to the jury not to speak with the media about the case or to read or listen to any reports about the case, and gag orders on all trial participants.<sup>159</sup> The court also struck witness Jose Basulto’s statement and instructed the jury to disregard it.<sup>160</sup> The court found that the jury’s prompt, inquiry-free verdict at most was speculative, circumstantial evidence of the venue’s impact on the jury.<sup>161</sup> The court concluded that “any potential for prejudice ... was cured” “through the Court’s methodical, active pursuit of a fair trial from voir dire, to the presentation of evidence, to argument, and concluding with deliberations and the return of verdict.”<sup>162</sup> As to the defendants’ claims of prosecutorial misconduct, the court found that it upheld each of defense counsel’s objections and specially instructed the jury that it was to disregard

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<sup>157</sup> R13-1392.

<sup>158</sup> *Id.* at 14.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 15.

<sup>162</sup> *Id.*

the improper statements.<sup>163</sup> In light of the entire record, the interests of justice did not merit a new trial.<sup>164</sup>

On November 12, 2002, the defendants renewed their motion for a new trial on two grounds: newly discovered evidence and the interests of justice.<sup>165</sup> They argued that they were entitled to a new trial based on the government's motion for change of venue filed June 25, 2002, in the case of *Ramirez v. Ashcroft*,<sup>166</sup> a Title VII action brought by a Hispanic employee of the INS.<sup>167</sup> Ramirez alleged he was subjected to a hostile work environment, unlawful retaliation, and intimidation by his employer as a result of the INS's removal of Elian Gonzalez from the United States and his return to his father in Cuba on April 22, 2000.<sup>168</sup> According to the defendants, the government's decision to seek a change of venue in *Ramirez*, based upon the alleged prejudicial effect of the pervasive community sentiment following the custody battle over Elian Gonzalez, constituted newly discovered evidence of

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<sup>163</sup> *Id.* at 15-16.

<sup>164</sup> *Id.* at 17. In December 2001, Guerrero, Hernandez, and Medina were sentenced to life, Campa was sentenced to 228 months, and Gonzalez was sentenced to 15 years. R14-1430, 1435, 1437, 1439, 1445. After sentencing, the defendants appealed.

<sup>165</sup> R15-1635, 1638, 1644, 1647, 1650, 1651.

<sup>166</sup> No. 01-4835 (S.D. Fla. June 25, 2002).

<sup>167</sup> R15-1635 at 8-11.

<sup>168</sup> R15-1636 at Ex.2 at 1-2.



prosecutorial misconduct because the same United States Attorney opposed the defendants' repeated motions for change of venue in the instant case and misrepresented the pervasive community prejudice in the Miami community.<sup>169</sup> In support of this argument, the defendants filed the government's *Ramirez* motion for change of venue, in which it argued that "the Miami-Dade community has developed and maintains strong emotional feelings and opinions regarding the handling of the Elian Gonzalez affair by INS and the Attorney General's office."<sup>170</sup> The government asserted, "it is extremely unlikely that a venire from Miami-Dade County would be able to put aside such deeply held opinions and feelings and afford the [government] a fair trial ...."<sup>171</sup>

The defendants further argued that a new trial should be granted in the interests of justice.<sup>172</sup> They argued that surveys of the Miami-Dade community, the responses given by prospective jurors during voir dire, and the atmosphere surrounding the voir dire demonstrated that a fair and impartial jury could not be selected in this case.<sup>173</sup> In support, they filed an affidavit by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Anthropology Dr. Lisandro

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<sup>169</sup> R15-1635 at 8-11.

<sup>170</sup> R15-1636 at Ex. 2 at 16.

<sup>171</sup> *Id.*

<sup>172</sup> R15-1635 at 12-32.

<sup>173</sup> *Id.*

Pérez.<sup>174</sup> Dr. Brennan evaluated Professor Moran's survey and concluded that it "accurately reflect[ed] profound existing bias against those associated with the Cuban government in Miami-Dade County."<sup>175</sup> Dr. Pérez concluded that "the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero."<sup>176</sup> The defendants also supported their interests of justice argument with news articles and reports by Human Rights Watch, which addressed the harassment, intimidation, and violence that Miami Cuban exiles suffered for expressing moderate political views toward Castro or Cuban relations.<sup>177</sup>

The district court denied the renewed motion for new trial holding that the government's decision to move for a change of venue in *Ramirez* did not constitute newly discovered evidence of prosecutorial misconduct with respect to the government's opposition to the defendants' motions for change of venue in this case.<sup>178</sup> The court reasoned that *Ramirez* differed from this case in that it "related directly to the INS's handling of the removal of Elian Gonzalez from his uncle's home, an event which, it is arguable, garnered much more attention here in

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<sup>174</sup> R15-1636 at Exs. 4,5.

<sup>175</sup> *Id.* at Ex. 4 at 8.

<sup>176</sup> *Id.* at Ex. 5 at 2-3.

<sup>177</sup> *Id.* at Exs. 7-10, 12.

<sup>178</sup> R15-1678 at 8.

Miami and worldwide than this case.”<sup>179</sup> The government’s position in *Ramirez* “was premised specifically upon the facts of that case,” including the fact that Ramirez “had stirred up extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit ....”<sup>180</sup> The court also ruled that it lacked jurisdiction to grant a new trial based on the defendants’ interests of justice argument because such a motion must be filed within seven days after the guilty verdict, or within an extension of time granted by the trial judge.<sup>181</sup> This time period had expired more than 19 months before the motion was filed, and therefore, the court declined to consider that argument, or any of its supporting exhibits.<sup>182</sup>

In a published opinion addressing only the motions for change of venue and motions for a new trial, a panel of this court concluded that the defendants were entitled to a pretrial change of venue and were denied a fair trial because of the “perfect storm” created by the pretrial publicity surrounding this case, the pervasive community sentiment, and the government’s closing arguments.<sup>183</sup> We vacated the panel opinion and granted the government’s petition for rehearing en banc to consider whether the defendants were denied

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<sup>179</sup> *Id.* at 8-9.

<sup>180</sup> *Id.* at 9.

<sup>181</sup> *Id.* at 5.

<sup>182</sup> *Id.* at 6.

<sup>183</sup> *United States v. Campa*, 419 F.3d 1219 (11th Cir.) (per curiam), *reh’g granted, vacated*, 429 F.3d 1011 (11th Cir.2005) (per curiam).

a fair and impartial trial.<sup>184</sup>

## II. DISCUSSION

On appeal, we first consider whether the district court abused its discretion in denying the defendants' Rule 21 motion for change of venue for failure to make a sufficient showing of prejudice due to either pretrial publicity or pervasive community prejudice. The second issue we consider is whether the court abused its discretion in denying their Rule 33 motions for new trial based on newly discovered evidence and the interests of justice.

### *A. Denial of Motions for Change of Venue*

We review a district court's denial of a Rule 21 motion for change of venue for an abuse of discretion.<sup>185</sup> Rule 21 provides that, "[u]pon the defendant's motion, the court must transfer the proceeding ... to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."<sup>186</sup> A defendant can establish that prejudice against him prevented him from receiving a fair trial and necessitated a change of venue by two methods. He can demonstrate that a fair trial was impossible because the jury was actually prejudiced against

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<sup>184</sup> *Id.*

<sup>185</sup> *United States v. Smith*, 918 F.2d 1551, 1556 (11th Cir.1990).

<sup>186</sup> Fed.R.Crim.P. 21(a).

him.<sup>187</sup> Or, he can show that juror prejudice should have been presumed from prejudice in the community and pretrial publicity.<sup>188</sup> Here, the defendants argue that a presumption of prejudice was warranted because of the pervasive community prejudice against the Cuban government and its agents and the pretrial publicity that existed in Miami.

A district court must presume that so great a prejudice exists against the defendant as to require a change of venue under Rule 21 if the defendant shows: (1) that widespread, pervasive prejudice against him and prejudicial pretrial publicity saturates the community where he is to be tried and (2) that there is a reasonable certainty that such prejudice will prevent him from obtaining a fair trial by an impartial jury.<sup>189</sup> The presumed prejudice

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<sup>187</sup> *Irvin v. Dowd*, 366 U.S. 717, 727, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961).

<sup>188</sup> *Rideau v. Louisiana*, 373 U.S. 723, 726-27, 83 S.Ct. 1417, 1419-20, 10 L.Ed.2d 663 (1963).

<sup>189</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) ("[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."); *Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir.1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.").

principle is " 'rarely' applicable" and is reserved for an "extreme situation."<sup>190</sup> "[T]he burden placed upon the [defendant] to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one."<sup>191</sup> Once the defendant puts forth evidence of the pervasive prejudice against him, the government can rebut any presumption of juror prejudice by demonstrating that the district court's careful and thorough voir dire, as well as its use of prophylactic measures to insulate the jury from outside influences, ensured that the defendant received a fair trial by an impartial jury.<sup>192</sup>

### 1. *The News Articles*

Here, the district court concluded that the defendants failed to present evidence sufficient to raise a presumption of prejudice against them that would impair their right to a fair trial by an impartial jury.<sup>193</sup> In support of their motion for change of venue, the defendants first relied on numerous news articles, which they argued demonstrated that the community atmosphere was "so pervasively inflamed" that it would impair any

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<sup>190</sup> *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683, 694 (1976), *Hale v. United States*, 435 F.2d 737, 747 (5th Cir.1970)).

<sup>191</sup> *Coleman v. Kemp*, 778 F.2d 1487, 1537 (11th Cir.1985).

<sup>192</sup> See *Id.* at 1541, n. 25; *Mayola*, 623 F.2d at 1000-01.

<sup>193</sup> R5-586 at 16.



juror's ability to reach a fair verdict.<sup>194</sup>

The district court did not abuse its discretion in finding that the pretrial publicity was not "so inflammatory and pervasive as to raise a presumption of prejudice."<sup>195</sup> Prejudice against a defendant cannot be presumed from pretrial publicity regarding peripheral matters that do not relate directly to the defendant's guilt for the crime charged.<sup>196</sup> In fact, we are not aware of any case in which any court has ever held that prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant.<sup>197</sup>

Moreover, the Supreme Court has ruled that we cannot presume prejudice in the absence of a "trial atmosphere ... utterly corrupted by press coverage."<sup>198</sup> The Court distinguished between publicity that is "largely factual publicity" and "that which is

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<sup>194</sup> R2-317 at 3.

<sup>195</sup> R5-586 at 11 (quoting *Ross v. Hopper*, 716 F.2d 1528, 1541 (11th Cir.1983)).

<sup>196</sup> See *United States v. Awan*, 966 F.2d 1415, 1428 (11th Cir.1992); see also *Meeks v. Moore*, 216 F.3d 951, 963 n. 19, 967 (11th Cir.2000) (ruling that only media reports linked directly to the defendant had "evidentiary value" in assessing his presumed prejudice claim, which failed absent a showing that "bias played any part in his convictions").

<sup>197</sup> See *Awan*, 966 F.2d at 1428.

<sup>198</sup> *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344, 362 (1977) (alteration in original) (internal quotation marks omitted) (quoting *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975)).

invidious or inflammatory," in *Murphy v. Florida*,<sup>199</sup> a case in which the Court ruled that the defendant was not denied due process when he was denied a change of venue, despite extensive publicity about the defendant's crime and criminal history. The Court found that there was no inflamed community atmosphere because the news articles appeared seven to twenty months before the jury was selected and the articles were largely factual in nature.<sup>200</sup> The Court also distinguished between jurors' "mere familiarity [with the defendant and his past crimes] and an actual predisposition against him."<sup>201</sup> Some of the jurors had a vague recollection of the alleged crime, but none believed that the defendant's past crimes were connected to the present case, nor did

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<sup>199</sup> 421 U.S. 794, 800 n. 4, 95 S.Ct. 2031, 2036 n. 4, 44 L.Ed.2d 589.

<sup>200</sup> *Id.* at 802, 95 S.Ct. at 2037; see also *Spivey v. Head*, 207 F.3d 1263, 1270-71 (11th Cir.2000) (ruling that the defendant failed to establish that pretrial publicity was sufficiently prejudicial or inflammatory to require a change of venue because the numerous newspaper articles that the defendant put forth were either published years before the trial or only obliquely mentioned his case, and because the prejudicial articles were not typical or widespread); *United States v. De La Vega*, 913 F.2d 861, 865 (11th Cir.1990) (ruling that the 330 articles submitted by the defendants were largely factual and could not have created an inflamed community atmosphere sufficient to presume prejudice in the Miami-Dade community of 1.8 million people).

<sup>201</sup> *Murphy*, 421 U.S. at 800 n. 4, 95 S.Ct. at 2036 n. 4.

the voir dire indicate that the jurors were prejudiced against him.<sup>202</sup> Therefore, the defendant failed to show that the trial was "inherently prejudicial" or that the jury selection process permitted an "inference of actual prejudice."<sup>203</sup>

Here, the news materials submitted by the defendants fall far short of the volume, saturation, and invidiousness of news coverage sufficient to presume prejudice. Of the numerous articles submitted, very few related directly to the defendants and their indictments.<sup>204</sup> The articles primarily concerned subjects such as the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter.<sup>205</sup> Of the articles about the Brothers to the Rescue shootdown, most were published approximately one year before the court first ruled on the change of venue motion.<sup>206</sup> Therefore, the few articles that did relate to the defendants and their alleged activities in particular were too factual and too old to be inflammatory or prejudicial. Moreover, the record reflects that not a single juror who deliberated on this case indicated that he or she was in any way influenced by news coverage of the case.<sup>207</sup> Nor does

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<sup>202</sup> *Id.* at 800-01, 95 S.Ct. at 2036.

<sup>203</sup> *Id.* at 803, 95 S.Ct. at 2037.

<sup>204</sup> *See* R2-317, 321, 324, 334, 329; R3-397, 455.

<sup>205</sup> *See Id.*

<sup>206</sup> *See Id.*

<sup>207</sup> *See* R21-28.

the record reflect that any one of them had formed an opinion about the guilt or innocence of the defendants before the trial began.<sup>208</sup> In fact, most of the venire revealed that they were either entirely unaware of the case, or had only a vague recollection of it.<sup>209</sup> "To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent."<sup>210</sup> Accordingly, the defendants have failed to demonstrate that this trial was "utterly corrupted by press coverage."<sup>211</sup>

## 2. *The Moran Survey*

The district court also considered the results of the random survey of 300 registered Miami-Dade voters conducted by Professor Moran, which was purportedly designed to examine prejudice against anyone alleged to have assisted the Cuban government in espionage activities.<sup>212</sup> According to Professor Moran, the survey indicated that "the only viable means of assuring the defendant a fair and impartial jury" was to transfer the case out of the Miami District of the Southern District of Florida.<sup>213</sup>

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<sup>208</sup> *See Id.*

<sup>209</sup> *See Id.*

<sup>210</sup> *Murphy*, 421 U.S. at 800 n. 4, 95 S.Ct. at 2036 n. 4.

<sup>211</sup> *See Id.* at 798, 95 S.Ct. at 2035.

<sup>212</sup> R5-586 at 13-15.

<sup>213</sup> R2-321 at Ex. A at 16.

The court declined to afford the survey and Professor Moran's conclusions substantial weight in determining whether to change the venue, but invited the defendants to renew their motions for change of venue if the voir dire showed that an impartial jury could not be empaneled.<sup>214</sup>

It was entirely within the district court's prerogative to reject outright Professor Moran's survey as a basis upon which to grant a motion to change venue. The record reflects that the district court carefully considered the survey and Professor Moran's conclusions, finding six specific reasons why the survey was unpersuasive.<sup>215</sup> The strongest support for the court's conclusion was the fact that Moran relied on the very same survey that we previously rejected in *Fuentes-Coba* as a basis for his conclusion that a substantial prejudice existed in the Southern District of Florida against defendants alleged to have helped the Castro government.<sup>216</sup> Moreover, the survey was riddled with non-neutral questions, such as the question that asked the respondent to agree or disagree whether "Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades."<sup>217</sup> The survey was too ambiguous to be reliable. For example, it asked if there are "any circumstances" that would

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<sup>214</sup> R5-586 at 13-15.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

change the respondent's "opinion," but it did not clarify to which "opinion" the question refers.<sup>218</sup> Moreover, only two questions in the entire survey directly referenced the defendants.<sup>219</sup>

Our deferential standard of review requires us to affirm the district court's conclusion that the Moran survey was not sufficiently persuasive to support a motion for change of venue. "The well established rule vests substantial discretion in the district court as to the granting or denying of a motion for transfer ...."<sup>220</sup> "The trial court is necessarily the first and best judge of community sentiment and the indifference of the prospective juror. Appellate courts ... will interfere only upon a showing of manifest probability

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<sup>218</sup> *Id.*

<sup>219</sup> See R2-321 at Ex. D. The dissent argues that the district court focused its analysis solely on prejudicial publicity and failed to make any findings regarding prejudice within the community. We disagree with this characterization of the district court's ruling. The court "construe[d][the][d]efendants' Motions [for change of venue] as directed *primarily* toward the issue of 'pervasive community prejudice' ...." R5-586 at 10, n.2 (emphasis added). And, while the court did not go so far as to find the community was "heterogenous" and "highly diverse," as the government argued, R3-443 at 3, the court did make a specific finding as to prejudice in the community: that the defendants' evidence did not demonstrate that community prejudice warranted a change of venue under Rule 21. R5-586 at 16.

<sup>220</sup> *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir.1975).



of prejudice.”<sup>221</sup>

Furthermore, the court’s decision to deny the defendants’ pretrial change of venue motions without prejudice in favor of proceeding to voir dire was a well-supported exercise of discretion. When a defendant alleges that prejudicial pretrial publicity would prevent him from receiving a fair trial, it is within the district court’s broad discretion to proceed to voir dire to ascertain whether the prospective jurors have, in fact, been influenced by pretrial publicity.<sup>222</sup> Once the court has conducted an appropriate voir dire examination, it also has the broad discretion to rule whether prejudice resulted from the pretrial publicity such that the defendant would be denied a fair trial.<sup>223</sup> Indeed, we have ruled that a trial court’s method of holding its decision on a Rule 21 motion for change of venue in abeyance until the conclusion of the voir dire “is clearly the preferable procedure.”<sup>224</sup> Even the defendants themselves admitted that the district court’s voir dire more thoroughly evaluated the sentiment of the Miami-Dade community. They admitted, “quite frankly, if Professor Moran could interrogate his pool members the way this Court has interrogated some of the prospective jurors, the social sciences wouldn’t be

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<sup>221</sup> *Bishop v. Wainwright*, 511 F.2d 664, 666 (5th Cir.1975).

<sup>222</sup> *See United States v. Nix*, 465 F.2d 90, 96 (5th Cir.1972).

<sup>223</sup> *See Id.*

<sup>224</sup> *Williams*, 523 F.2d at 1209 n. 10.

soft sciences, they would be hard sciences.”<sup>225</sup>

### 3. *The Voir Dire*

The voir dire in this case was a model voir dire for a high profile case. The court conducted a meticulous two-phase voir dire stretching over seven days.<sup>226</sup> In contrast to the generalized, pre-fabricated, and sometimes leading questions of Professor Moran’s survey were the detailed and neutral voir dire questions that the court carefully crafted with the parties’ assistance.<sup>227</sup> In the first phase of voir dire, the court screened 168 prospective jurors for hardship and their ability to reach a verdict based solely on the evidence.<sup>228</sup> In the second phase, the court extensively and individually questioned 82 prospective jurors outside the venire’s presence regarding sensitive subjects, such as involvement in pro- and anti-Castro political groups and immigration into the United States from Cuba.<sup>229</sup> Phase two questioning revealed that most of the prospective jurors, and all of the empaneled jurors, had been exposed to little or no media coverage of the case.<sup>230</sup> Those who had been exposed to media coverage of the case vaguely recalled a “shootdown,” but little else.<sup>231</sup> Ultimately, the court struck 32 out of 168 potential

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<sup>225</sup> R27 at 1374.

<sup>226</sup> R21-23.

<sup>227</sup> Gov’t Br. at App. G.

<sup>228</sup> R6-766; R21-R24.

<sup>229</sup> R25-28.

<sup>230</sup> *See Id.*

<sup>231</sup> *See Id.*

jurors (19%) for Cuba-related animus, which was well within an acceptable range.<sup>232</sup> Qualified jurors need not be totally ignorant of the facts and issues involved:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.<sup>233</sup>

At the conclusion of the voir dire, the defendants

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<sup>232</sup> Compare *Patton v. Yount*, 467 U.S. 1025, 1029, 1035, 104 S.Ct. 2885, 2888, 2891, 81 L.Ed.2d 847, 853, 856 (1984) (holding that the trial court did not err in finding that the jury was impartial, even though "77% [of the venire] admitted they would carry an opinion in to the jury box," because the "relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially"), and *Murphy*, 421 U.S. at 803, 95 S.Ct. at 2038 (holding that excusing 20 out of 78 prospective jurors [or, 26%] "by no means suggests a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no animus of their own"), with *Irvin*, 366 U.S. at 727, 81 S.Ct. at 1645 (reversing the defendant's conviction because 268 of the 430 venirepersons, or 62%, had fixed opinions regarding the defendant's guilt).

<sup>233</sup> *Irvin*, 366 U.S. at 722-23, 81 S.Ct. at 1642-43.

failed to express any dissatisfaction with the selected jurors in terms of their ability to serve fairly and impartially,<sup>234</sup> and even complimented the court's voir dire as "extraordinary"<sup>235</sup> and stated that they were "very happy with" the jury.<sup>236</sup> The court's voir dire was so effective in screening potential jurors that the defendants did not exercise all of their peremptory challenges.<sup>237</sup> We have ruled that a defendant's failure to use all peremptory challenges "indicates the absence of juror prejudice."<sup>238</sup> Moreover, the defendants failed to renew their change of venue motions at the end of the voir dire, despite the court's invitation to do so, further indicating their satisfaction with the jury and a lack of juror prejudice.<sup>239</sup> Accordingly, the court's careful and thorough voir dire rebutted any presumption of jury prejudice.<sup>240</sup>

"A trial court's finding of juror impartiality may be overturned only for manifest error."<sup>241</sup> We owe the

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<sup>234</sup> R29 at 1564.

<sup>235</sup> R27 at 1373.

<sup>236</sup> R104 at 12092.

<sup>237</sup> R28 at 1513.

<sup>238</sup> *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985).

<sup>239</sup> *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir.2003).

<sup>240</sup> See *Coleman*, 778 F.2d at 1541 n. 25; *Mayola*, 623 F.2d at 1000-01.

<sup>241</sup> *Mu'Min v. Virginia*, 500 U.S. 415, 428, 111 S.Ct. 1899, 1907, 114 L.Ed.2d 493, 508 (1991) (quoting *Patton*, 467 U.S. at 1031, 104 S.Ct. at 2889).

district court "wide discretion" in "conducting voir dire in the area of pretrial publicity and in other areas that might tend to show juror bias."<sup>242</sup> "The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation any of such claim his own perception of the depth and extent of news stories that might influence a juror."<sup>243</sup>

In sum, the record in this case amply demonstrates that the district court took extraordinary measures to carefully select a fair and impartial jury. The court extensively and individually questioned the prospective jurors, repeatedly cautioned them not to read anything or talk to anyone about the case, insulated the jurors from media publicity, provided the defendants with extra peremptory challenges, struck 32 persons for cause,

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<sup>242</sup> *Id.* at 427, 111 S.Ct. at 1906.

<sup>243</sup> *Id.* The dissent suggests that the "plethora of media" and "ubiquitous electronic communications devices" that characterize this "high-tech age" spread community prejudice across the district, necessitating a change in venue. We think, however, that such advances in communication technology support the opposite conclusion. If prejudice could be spread through multiple forms of media, the spread of such prejudice would not stop at district lines, but would extend across the state of Florida. Following that rationale, the district court should have refused to change venue because a district outside Miami-Dade would have been no more capable of producing a panel of impartial jurors than Miami-Dade itself. This is why we afford deference to the district court's assessment of juror credibility and impartiality.

and struck all of the Cuban-Americans over the government's *Batson* objection.<sup>244</sup> Under these circumstances, we will not disturb the district court's broad discretion in assessing the jurors' credibility and impartiality.

#### 4. *The Trial*

A review of the record reveals that this trial "comported with the highest standards of fairness and professionalism."<sup>245</sup> The court maintained strict control over the proceedings by employing various curative measures to insulate the jury from any outside influence, from the beginning of the trial to the jury's verdict. From the commencement of the case, the parties, counsel, and witnesses were under a strict gag order, as well as a sequestration order, which prohibited them from releasing information or opinion that would interfere with the trial or otherwise prejudice the defendants.<sup>246</sup> On each day of the trial, before every recess, and at the end of every day, the court admonished the jurors not to discuss

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<sup>244</sup> The government objected to the striking of all Cuban-Americans, the district court denied the *Batson* challenge, and the government has not raised that issue in any way. Accordingly, we have no opportunity to review the propriety of striking all the members of a particular nationality. We simply note that although the defendants challenge their convictions based on an alleged pervasive anti-Cuban sentiment in the Southern District of Florida, every Cuban-American was struck from the venire.

<sup>245</sup> *Alvarez*, 734 F.2d at 859.

<sup>246</sup> 2SR1-122 at 1; R21 at 117-19; R7-978 at 3, 7; R64 at 6759-60.



the case amongst themselves or with others, not to have contact with anyone associated with the trial, and not to expose themselves, read, or listen to anything related to the case.<sup>247</sup> The court maintained control over the seating in the courtroom as well, designating certain rows to certain groups and requiring the media to sit in the back row.<sup>248</sup> The court prevented the media from accessing the voir dire questions by sealing them during jury selection.<sup>249</sup>

The court fiercely guarded the jury from outside intrusions. From the first day of trial, the court instructed the marshals to accompany the jury, with their juror tags removed, as they left the building.<sup>250</sup> The court rejected the media's request for the twelve jurors' names.<sup>251</sup> The court took extra steps to insulate the jurors during their deliberations, arranging for them to enter the courthouse by a private entrance and providing them with transportation to their vehicles or mass transit.<sup>252</sup>

### *5. Supreme Court Precedent*

This case was nothing like the cases in which the Supreme Court has previously found that defendants were denied a fair trial by an impartial jury because of pretrial publicity or pervasive community

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<sup>247</sup> See R21-28.

<sup>248</sup> R25 at 717.

<sup>249</sup> R24 at 625-26.

<sup>250</sup> R21 at 112.

<sup>251</sup> R126 at 14643-44.

<sup>252</sup> *Id.* at 14645-47.

prejudice. The record reflects that the pretrial community atmosphere in this case was unlike that which existed in *Irvin v. Dowd*. In that case, the rural, Indiana community of 30,000 where the defendant was tried was subjected to a barrage of inflammatory publicity immediately before trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders, including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence.<sup>253</sup> The Supreme Court ruled that the defendant was entitled to a change of venue because the prejudice against him was "clear and convincing," as reflected by the fact that eight of the twelve jurors had formed an opinion that he was guilty before the trial began.<sup>254</sup>

Also distinguishable from this case is *Rideau v. Louisiana*,<sup>255</sup> a case in which the police illegally obtained a confession from the defendant, which a local television station filmed and broadcast three times in the community where the crime and the trial occurred. "[W]ithout pausing to examine a particularized transcript of the voir dire examination of members of the jury," the Supreme Court overturned the conviction, holding that the widespread dissemination of this highly damaging material rendered the defendant's trial nothing more than "a hollow formality."<sup>256</sup> The Court ruled that the

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<sup>253</sup> *Irvin*, 366 U.S. at 725-27, 81 S.Ct. at 1644-45.

<sup>254</sup> *Id.*

<sup>255</sup> 373 U.S. at 724, 83 S.Ct. at 1418.

<sup>256</sup> *Id.* at 726-27, 83 S.Ct. at 1419-20.

"kangaroo court proceedings" deprived the defendant of due process.<sup>257</sup>

The district court's implementation of numerous curative measures to insulate the jury from disruptive influences in this case also sits in stark contrast to the "carnival atmosphere" that warranted a reversal of the defendant's conviction in *Sheppard v. Maxwell*.<sup>258</sup> In *Sheppard*, the judge did not adequately direct the jury not to read or listen to anything concerning the case, but merely suggested that the jury not expose themselves to media reports.<sup>259</sup> The jurors were "thrust into the role of celebrities by the judge's failure to insulate them from the reporters and photographers," when numerous pictures of the jurors and their addresses appeared in the newspaper.<sup>260</sup> Likewise, in *Estes v. Texas*,<sup>261</sup> the defendant was denied his due process rights because the courtroom was a "mass of wires, television cameras, microphones, and photographers." At least twelve cameramen were allowed to photograph the proceedings, "[c]ables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others

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<sup>257</sup> *Id.* at 726, 83 S.Ct. at 1419.

<sup>258</sup> 384 U.S. 333, 358, 86 S.Ct. 1507, 1520, 16 L.Ed.2d 600 (1966).

<sup>259</sup> *Id.* at 353, 86 S.Ct. at 1517.

<sup>260</sup> *Id.*

<sup>261</sup> 381 U.S. 532, 550, 85 S.Ct. 1628, 1636, 14 L.Ed.2d 543, 554 (1965).

were beamed at the jury box and the counsel table.”<sup>262</sup>

The rare instances in which the Supreme Court has presumed prejudice to overturn a defendant's conviction are far different from this case. In those cases, the “kangaroo court proceedings” in combination with the “circus atmosphere” generated by sensational pretrial publicity deprived the defendant of a fair trial. Here, the district court carefully and meticulously evaluated the defendants' evidence of pretrial publicity and then made specific factual findings to discount that evidence. At trial, the court used numerous curative measures to prevent any publicity from affecting the jury's deliberations.

In sum, to establish a presumption of juror prejudice necessitating Rule 21 change of venue, a defendant must demonstrate that (1) widespread, pervasive prejudice and prejudicial pretrial publicity saturates the community, and (2) there is a reasonable certainty that the prejudice prevents the defendant from obtaining a fair trial. We find that the defendants in this case failed to meet this two-pronged test. They failed to show that so great a prejudice existed against them as to require a change of venue under Rule 21, in light of the court's effective use of prophylactic measures to carefully manage individual voir dire examination of each and every panel member and its successful steps to isolate the jury from every extrinsic influence. Under these circumstances, we will not disturb the district

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<sup>262</sup> *Id.* at 536, 85 S.Ct. at 1629.

court's broad discretion in ruling that this is not one of those rare cases in which juror prejudice can be presumed.

*B. Denial of Motions for New Trial*

We review a district court's denial of a motion for new trial for abuse of discretion.<sup>263</sup> Rule 33 of the Federal Rules of Criminal Procedure provides:

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.<sup>264</sup>

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<sup>263</sup> *United States v. Vallejo*, 297 F.3d 1154, 1163 (11th Cir.2002).

<sup>264</sup> Fed.R.Crim.P. 33. Rule 33 was amended December 1, 2002, "as a part of the general restyling of the Criminal Rules to make them more easily

Thus, there are two grounds upon which a court may grant a motion for new trial: one based on newly discovered evidence, which must be filed within three years of the verdict pursuant to Rule 33(b)(1); and the other based on any other reason, typically the interest of justice, which must be filed within seven days of the verdict, pursuant to Rule 33(b)(2).<sup>265</sup>

"Motions for a new trial based on newly discovered evidence are highly disfavored in the Eleventh Circuit and should be granted only with great caution. Indeed, the defendant bears the burden of justifying a new trial."<sup>266</sup> Newly discovered evidence need not relate directly to the issue of guilt or innocence to justify a new trial, "but may be probative of another issue of law."<sup>267</sup> For instance, the existence of a *Brady* violation, as well as questions regarding the fairness or impartiality of a jury, may

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understood and to make style and terminology consistent throughout the rules. These changes [were] intended to be stylistic only." See Fed.R.Crim.P. 33 advisory committee's note 2002. We apply the current version of Rule 33, even though the defendants' new trial motions were filed before the 2002 amendments were effective.

<sup>265</sup> See Fed.R.Crim.P. 33; *United States v. Devila*, 216 F.3d 1009, 1015 (11th Cir.2000) (per curiam) *vacated in part on other grounds*, 242 F.3d 995, 996 (2001) (per curiam).

<sup>266</sup> *Devila*, 216 F.3d at 1015-16 (quotations and citations omitted).

<sup>267</sup> *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir.1978) (per curiam).



be grounds for a new trial.<sup>268</sup>

The defendants are not entitled to a new trial on the basis of newly discovered evidence under Rule 33(b)(1) because the government's decision to move for a change of venue in *Ramirez* does not constitute newly discovered evidence of prosecutorial misconduct with respect to the government's earlier opposition to the defendants' motions for change of venue in this case. *Ramirez* was entirely different from this case in that it was a Title VII employment discrimination case arising out of the INS's role in the removal of Elian Gonzalez from his uncle's home, whereas this case involved agents of the government of Cuba operating unlawfully in the United States and conspiring to commit espionage and murder.<sup>269</sup> Moreover, Ramirez's conduct in procuring and exploiting partisan media coverage of the evidence and the issues in his case distinguished *Ramirez* from the instant case. On the day Ramirez filed his lawsuit, he held a press conference on the steps of the courthouse, during which he displayed one of the

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<sup>268</sup> *Id.* at 339; *United States v. Williams*, 613 F.2d 573, 575 (5th Cir.1980) (stating that a motion for new trial is appropriate if the newly discovered evidence "afford[ed] reasonable grounds to question the fairness of the trial or the integrity of the verdict," but affirming the denial of a new trial because there was no reasonable likelihood that a juror's ex parte contact with the district judge impugned the integrity of the jury's verdict (citing *S. Pac. Co. v. Francois*, 411 F.2d 778, 780 (5th Cir.1969))).

<sup>269</sup> R15-1660 at 7-8.

items featured in his complaint, an example of a cup holder with a picture of the Cuban flag and the international “no symbol.”<sup>270</sup> *The Miami Herald* quoted Ramirez saying that the INS was “the most corrupt agency in the country” with a “deep hatred toward Hispanics.”<sup>271</sup> He appeared on several radio and television shows, local rallies, and protests, and his photograph appeared on banners carried by protestors demonstrating outside of the INS building.<sup>272</sup> On one television show, Ramirez disclosed a document produced during a videotaped deposition taken during discovery and caused the deposition itself to be broadcast on the show, in violation of Local Rule 77.2.<sup>273</sup>

The defendants’ argument that the government’s subsequent legal position in the *Ramirez* case constituted prosecutorial misconduct that warrants a new trial is essentially a claim of judicial estoppel. Judicial estoppel bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, related proceeding.<sup>274</sup> It “is designed to prevent parties from making a mockery of justice by inconsistent pleadings.”<sup>275</sup>

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<sup>270</sup> *Id.* at 10.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 11.

<sup>273</sup> *Id.*

<sup>274</sup> *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968, 977 (2001).

<sup>275</sup> *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir.2002) (internal quotation marks omitted) (quoting *Am. Nat’l Bank of Jacksonville v.*

Courts consider two factors in determining whether to apply the doctrine: whether the “allegedly inconsistent positions were made under oath in a prior proceeding” and whether such inconsistencies were “calculated to make a mockery of the judicial system.”<sup>276</sup> Judicial estoppel is not applicable here because *Ramirez* was not a related proceeding, but rather an employment discrimination lawsuit. Moreover, the position that the government took in *Ramirez* occurred subsequent to—not before—its position in this case. The government filed its motion for change of venue in *Ramirez* on June 25, 2002, more than one year after the defendants were convicted.<sup>277</sup> Therefore, the defendants’ argument that the government should have been estopped from opposing its change of venue motions in a prior proceeding is chronologically unsound, and the court did not abuse its discretion in denying the defendants’ motion for new trial based on newly discovered evidence.

Nor are the defendants entitled to a new trial in the interests of justice under Rule 33(b)(2). The defendants timely filed their initial motion by the court-extended August 1, 2001, deadline<sup>278</sup> for filing

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*Fed. Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir.1983)).

<sup>276</sup> *Id.* at 1285 (quotations and citations omitted).

<sup>277</sup> R15-1636 at Ex. 2.

<sup>278</sup> R126 at 14672. The district court extended the seven-day time period within which the defendants could file post-trial motions, including a Rule 33 interests of justice motion, to August 1, 2001, in

post-trial motions, arguing that a new trial was warranted in the interests of justice due to the prejudice inured to them from the venue and the prosecution's misconduct at trial.<sup>279</sup> The district court denied the motion, citing the numerous curative measures it implemented to guarantee the defendants' right to a fair trial.<sup>280</sup> The record reflects that any potential for prejudice against the defendants was cured by the court's methodical pursuit of a fair trial. Basulto's comment that Hernandez's counsel was a spy for Cuba did not prejudice the defendants because it was merely a single remark during a seven-month trial by the defense's own witness, which the court struck and instructed the jury to disregard.<sup>281</sup> Moreover, the prosecution's closing arguments did not prejudice the defendants because the court granted the defendants' objections and specifically instructed the jury to disregard the improper statements.<sup>282</sup> These alleged incidents of government misconduct "were so minor that they could not possibly have affected the outcome of the trial."<sup>283</sup>

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accordance with the version of Rule 33 in effect at the time, which permitted the court to grant a motion filed "within such further time as the court sets during the 7-day period." See Fed.R.Crim.P. 33 advisory committee's note 2005.

<sup>279</sup> R12-1338, 1342, 1343, 1347.

<sup>280</sup> R13-1392.

<sup>281</sup> R81 at 8945-46, 8955.

<sup>282</sup> R124 at 14482, 14483, 14493.

<sup>283</sup> *Alvarez*, 755 F.2d at 859.

Thereafter, in November 2002, the defendants filed a renewed motion for new trial on both newly discovered evidence and interest of justice grounds.<sup>284</sup> The defendants based their renewed motion almost entirely on the interests of justice argument, devoting 20 of the 32 pages of the motion and 7 of the 12 supporting exhibits to that issue.<sup>285</sup> The defendants filed an affidavit and a survey from two new experts, an additional affidavit from Professor Moran defending his survey, and additional news articles and reports by the Human Rights Watch.<sup>286</sup> None of these materials were presented to the district court for consideration with the initial new trial motions. The district court declined to consider the defendants' renewed interests of justice argument and supporting materials, ruling that because "the seven-day period ... expired more than nineteen months ago," it lacked jurisdiction to grant the motion on that basis.<sup>287</sup>

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<sup>284</sup> R15-1635, 1638, 1644, 1647, 1650, 1651.

<sup>285</sup> R15-1635, R15-1636.

<sup>286</sup> R15-1636 at Exs. 4, 5, 7-10, 12.

<sup>287</sup> R15-1678 at 5. The district court relied on our precedent that states that "[t]here is no question that the seven-day time limit provided for in Rule 33 is jurisdictional." *United States v. Renick*, 273 F.3d 1009, 1019 (11th Cir.2001) (per curiam). The court did not have the benefit of *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 403, 163 L.Ed.2d 14, 17 (2005) (per curiam) (internal quotation marks omitted), which clarified that Rule 33 is "an inflexible claim-processing rule," rather than a rule "governing subject-matter jurisdiction." The Court noted that this "is an error shared among the circuits .... caused in large part by imprecision in

The district court did not abuse its discretion in refusing to consider the defendants' renewed motion based on the interests of justice. A court may not consider motions for new trial based on any other argument than newly discovered evidence outside the 7-day period.<sup>288</sup> "This deadline is rigid .... [C]ourts 'may not extend the time to take any action under [Rule 33], except as stated' in Rule 33 itself."<sup>289</sup> Nor does a district court have the power to regard an untimely motion for new trial as a supplement to a timely motion.<sup>290</sup> The time for the defendants to present the entirety of their interests of justice argument was when they initially filed it in July and August of 2001, within the court-extended August 1st deadline. The defendants' renewed motion for new trial based on the interests of justice was essentially the defendants' attempt to relitigate the merits of the venue issue that the court had previously considered four times. The defendants could have commissioned Drs. Brennan and Pérez to provide affidavits in support of their position during any one of those times when the court previously considered the issue. We will not permit, nor does Rule 33 permit, the defendants to take a second-or fifth-"bite at the

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[the Supreme Court's] prior cases." *Id.* at 407. Here, any error by the district court in characterizing Rule 33 new trial motions as jurisdictional was harmless.

<sup>288</sup> See Fed.R.Crim.P. 33(b)(2).

<sup>289</sup> *Eberhart*, 126 S.Ct. at 403 (quoting Fed.R.Crim.P. 45(b)(2)).

<sup>290</sup> *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir.1988).



apple."<sup>291</sup> Because the defendants' renewed interest of justice motion was filed outside the extended time period during which a court may consider new trial motions, and because the government preserved its argument that the claim was untimely,<sup>292</sup> the court did not abuse its discretion in declining to consider the issue.

Accordingly, because neither newly discovered evidence nor the interests of justice warrant a new trial, we affirm the court's decision to deny the defendants' motions for new trial.

### III. CONCLUSION

Based on our thorough review of this case, we rely on the trial judge's judgment in assessing juror credibility and impartiality. The trial judge, as a member of the community, can better evaluate whether there is a reasonable certainty that prejudice against the defendant will prevent him from obtaining a fair trial. The judge brings to the courtroom her own perception of the depth and extent of community prejudice and pretrial publicity that might influence a juror.

Miami-Dade County is a widely diverse, multi-racial community of more than two million people. Nothing in the trial record suggests that twelve fair

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<sup>291</sup> *United States v. Geders*, 625 F.2d 31, 33 (5th Cir.1980).

<sup>292</sup> *Eberhart*, 126 S.Ct. at 406 (ruling that the government forfeits its defense of untimeliness if it fails to raise the defense before the district court reaches the merits of the Rule 33 motion).

and impartial jurors could not be assembled by the trial judge to try the defendants impartially and fairly. The broad discretion the law reposes in the trial judge to make the complex calibrations necessary to determine whether an impartial jury can be drawn from a cross-section of the community to ensure a fair trial was not abused in this case. Although it is conceivable that, under a certain set of facts, a court might have to change venue to ensure a fair trial, the threshold for such a change is rightfully a high one. The defendants have not satisfied it.

For the reasons given, we AFFIRM the district court's denial of the defendants' motions for change of venue and for new trial. Having decided these issues upon which we granted en banc review, we REMAND this case to the panel for consideration of the remaining issues.

BIRCH, Circuit Judge, dissenting in which  
KRAVITCH, Circuit Judge, joins:

I respectfully dissent. I remain convinced that this case is one of those rare, exceptional cases that warrants a change of venue because of pervasive community prejudice making it impossible to empanel an unbiased jury. The defendants, as admitted agents of the Cuban government of Fidel Castro, were unable to obtain a fair and impartial trial in a community of pervasive prejudice against agents of Castro's Cuban government, whose prejudice was fueled by publicity regarding the trial and other local events. Accordingly, I would reverse their convictions and remand for a new trial.

I am convinced that, based on circuit precedent, our consideration of the denial of a motion for change of venue requires an independent review of the totality of the circumstances surrounding the trial. Therefore, in Part I, I consider in the "Background" the facts (omitted from the *en banc* opinion) that I conclude are essential to an understanding of the intense community pressures in this case. My review of the evidence at trial is more extensive than is typical for consideration of an appeal involving the denial of a motion for change of venue because I conclude that the *trial evidence itself* created safety concerns for the jury which mandate venue considerations. In Part II, I discuss the law and the application of the law to the facts in this case. In Part III, I present my conclusion. Moreover, in this media-driven environment in which we live, characterized by the ubiquitous electronic communications devices possessed by even children (e.g., the cell phone, the I-

pod, the laptop, etc.), this case presents a timely opportunity for the Supreme Court to clarify the right of an accused to an impartial jury in the high-tech age. Given the multiple resources for almost instantaneous communication and the plethora of media extant today, the considerations embraced by the Court in earlier times fail to address these developments.

### I. BACKGROUND

Included in with the charges forming the basis for the defendants-appellants' arrests and subsequent indictments were allegations that they, as agents of the Republic of Cuba, had infiltrated the United States military and reported on United States military activities, and that one of them, Gerardo Hernandez, had conspired to commit murder by supporting and implementing a plan in 1996 to shoot down United States civilian aircraft outside of Cuban and United States airspace.

The 1996 shootdown involved planes piloted by and carrying members of the Brothers to the Rescue ("BTTR"), a Cuban-exile group headquartered in Miami-Dade County. As a result of the Cuban government's military shootdown of two United States-registered civilian aircraft, four members of BTTR died.<sup>1</sup> Their deaths were condemned as murders by the international community. Statements deploring Cuba's excessive use of force were issued by the United Nations and other international

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<sup>1</sup> *United States v. Hernandez*, 106 F. Supp. 2d 1317, 1318 (S.D.Fla.2000).

organizations and legislation was passed in the United States “strongly” condemning the shutdown as an “act of terrorism by the Castro regime.”<sup>2</sup> The deceased were heralded as martyrs and their funerals were attended by numerous people within the community. Memorials were subsequently erected in their honor, and streets within the Miami-Dade County community were renamed for them.

The defendants’ arrests, therefore, generated intense interest within the community. Shortly after the arrests, the district court entered a gag order governing the parties and their attorneys.<sup>3</sup> That order, however, did not prevent leakage. In the early fall of 1999, the district court reminded the parties and their attorneys that they were to refrain from releasing information or opinions that could interfere with a fair trial or prejudice the administration of justice.<sup>4</sup> The district judge stated that she was “increasingly concerned” that various persons connected with the case were not following her order based on the “parade of articles appearing in the media about this case.”<sup>5</sup> In particular, she commented that an article about defendant Medina’s pending motion to incur expenses to poll the community “was the lead story in the local section on Saturday in the Miami Herald.”<sup>6</sup> She warned all

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<sup>2</sup> *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1247 (S.D.Fla.1997); 22 U.S.C. § 6046(1).

<sup>3</sup> R7-978 at 3; R21 at 117.

<sup>4</sup> R18 at 14.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 15.

counsel and agents associated with the case that appropriate action would be taken and that the U.S. Attorney's Office would be held responsible.<sup>7</sup> She directed that "[t]his case ... not ... get advertised anywhere in the media for any reason whatsoever."<sup>8</sup> The motion to incur expenses was filed in August 1999 and was subsequently granted by the district court.<sup>9</sup>

### *A. Motion for Change of Venue*

As the *en banc* opinion notes, Campa, Gonzalez, Guerrero, and Medina moved for a change of venue in January 2000, arguing that they were unable to obtain an impartial trial in Miami as a result of pervasive prejudice against anyone associated with Castro's Cuban government.<sup>10</sup> The motions for change

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<sup>7</sup> *Id.* at 14-15

<sup>8</sup> *Id.* at 17.

<sup>9</sup> R1-280 at 2-3; R2-303; R18 at 11-12.

<sup>10</sup> R2-317 (Guerrero), 321 (Medina), 324 (Gonzalez), 329 (Campa); R3-397 (Campa). Medina requested a change of venue "in light of evidence of pervasive community prejudice against the accused" as documented by Professor Gary Moran's survey which showed "public sentiment against persons alleged to be agents of Fidel Castro's Communist government in Cuba." R2-321 at 1-2. Moran concluded that, while there had been "several bursts of newspaper articles ... and other media attention" surrounding the Cuban spies' arrests, the basis for the motion was the "[v]irulent anti-Castro sentiment" in the community. *Id.* at 3.

Although Campa, Gonzalez, Guerrero, and Medina had originally argued that the case should be moved to another judicial district, during oral argument on



of venue were based on both the pretrial publicity and on the "virulent anti-Castro sentiment" which had existed in Miami as "a dominant value ... for four decades."<sup>11</sup> The motions were supported by news articles and Moran's poll to substantiate "an atmosphere of great hostility towards any person associated with the Castro regime" and "the extent and fervor of the local sentiment against the Castro government and its suspected allies."<sup>12</sup>

The evidence submitted in support of the motions for change of venue was massive. At that time, there were more than 700,000 Cuban-Americans living in Miami.<sup>13</sup> Of those Cuban-Americans, 500,000 remembered leaving their homeland, 10,000 had a relative murdered in Cuba, 50,000 had a relative tortured in Cuba, and thousands were former political prisoners.<sup>14</sup> These Cuban-Americans considered Cuban-related matters "hot-button issues."<sup>15</sup>

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the motions, they agreed that they would be satisfied with a transfer of the case within the district from the Miami division to the Fort Lauderdale division. R5-586 at 2 n.1.

<sup>11</sup> R2-321 at 3; R2-316 at 2; R2-317 at 2; R2-324 at 1; R2-329 at 1; R2-334 (containing news articles which detail the history of anti-Castro sentiment in Miami); R3-397 at 1; R3-453 at 1-2; R3-455 at 2; R3-461 at 2-3.

<sup>12</sup> R2-329 at 1, 3; R2-334; R3-397; R3-455.

<sup>13</sup> R15-1636, Ex. 9.

<sup>14</sup> *Id.*

<sup>15</sup> R15-1636, Exh. 9.

Professor Moran's survey results showed that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons charged with engaging in the activities named in the indictment.<sup>16</sup> A significant number, 57 percent of the Hispanic respondents and 39.6 percent of all respondents, indicated that, "[b]ecause of [their] feelings and opinions about Castro's government," they "would find it difficult to be a fair and impartial juror in a trial of alleged Cuban spies."<sup>17</sup> Over one-third of the respondents, 35.6 percent, said that they would be worried about criticism by the community if they served on a jury that reached a not-guilty verdict in a Cuban spy case.<sup>18</sup> The respondents who indicated an inability to be fair and impartial jurors were also asked whether there were any circumstances that would change their opinion.<sup>19</sup> Of those respondents, 91.4 percent of the Hispanics and 84.1 percent of the others answered "no."<sup>20</sup>

The articles submitted by the defendants included articles that related directly to the charged crimes and to the defendants and their codefendants.<sup>21</sup> Other articles documented

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<sup>16</sup> R2-321, Ex. A at 10.

<sup>17</sup> *Id.* at Ex. A at 12; *see Id.* at Ex. E at 3.

<sup>18</sup> *Id.* at Ex. A at 11-12.

<sup>19</sup> *Id.* at Ex. A at 13; *Id.* at Ex. E at 3.

<sup>20</sup> *Id.* at Ex. A at 13.

<sup>21</sup> The following articles specifically addressing the conspiracy and the indicted defendants were attached as exhibits in support of the motions for change of venue: George Gedda, *Federal officials say*

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*10 arrested, accused of spying for Cuba*, MIAMI HERALD, Sept. 14, 1998, R2-334, Ex.; Manny Garcia, Cynthia Corzo, Ivonne Perez, *Spies among us: Suspects attempted to blend in, Miami*, MIAMI HERALD, Sept. 15, 1998, at A1, R2-334; David Lyons, Carol Rosenberg, *Spies among us: U.S. cracks alleged Cuban ring, arrests 10*, MIAMI HERALD, Sept. 15, 1998, at A1, R2-329, Ex. A; R2-334, Ex.; *Spies among us*, MIAMI HERALD, Sept. 15, 1998, at 14A, R2-329, Ex. F; Fabiola Santiago, *Big news saddens, angers exile community*, MIAMI HERALD, Sept. 15, 1998, R2-334, Exh.; Juan O. Tamayo, *Arrest of spy suspects may be switch in tactics*, MIAMI HERALD, Sept. 15, 1998, R2-334, Exh.; Javier Lyonnet, Olance Nogueras, *Cae red de espionaje de Cuba / FBI viró al revés casa de supuesto cabecilla* and Pablo Alfons, Rui Ferreira, *Cae red de espionaje de Cuba / Arrestan a 10 en Miami*, NUEVO HERALD, Sept. 15, 1998, at A1, R2-329, Exh. B; *La Habana Contra El Pentagono* ("Havana versus the Pentagon") / *Estructura de la Red de Espionaje*, NUEVO HERALD, Sept. 15, 1998, R2-329, Exh. C; *Arrest of alleged Cuban spies demands vigorous prosecution*, SUN-SENTINEL, Sept. 16, 1998, at 30A, R2-329, Exh. G; Juan O. Tamayo, *Miscues blamed on military's takeover of Cuban spy agency*, MIAMI HERALD, Sept. 17, 1998, at 13A, R2-334, Exh.; David Kidwell, *Motion could delay trials of alleged 10 Cuban spies*, MIAMI HERALD, Oct. 6, 1998, at B1, R2-334, Exh.; David Lyons, *Cuban couple pleads guilty in spying case*, MIAMI HERALD, Oct. 8, 1998, at A1, R2-334, Exh.; David Kidwell, *Three more accused spies agree to plead guilty*, MIAMI HERALD, Oct. 9, 1998, at 4B, R2-329, Exh. H; R2-334, Exh.; Carol Rosenberg, *Couple admits role in Cuban spy ring*, MIAMI HERALD, Oct. 22, 1998, at 5B, R2-329, Exh. H; Juan O. Tamayo, *U.S.-Cuba spy agency contacts began a decade ago*, MIAMI HERALD, Oct. 31, 1998, R2-334, Exh.; David Kidwell, *U.S. tries to tie espionage case to planes' downing*, MIAMI

community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases in which Cuban-American

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HERALD, Nov. 13, 1998, at A1, R2-334, Exh.; Carol Rosenberg, *Identities of 3 alleged spies still unknown*, Nov. 14, 1998, at B1, R2-334, Exh.; Juan O. Tamayo, *Spies Among Us / Castro Agents Keep Eye on Exiles*, MIAMI HERALD, Apr. 11, 1999, R2-329, Exh. D; R2-334, Exh.; Carol Rosenberg, *Shadowing of Cubans a classic spy tale*, MIAMI HERALD, Apr. 16, 1999, at A1, R2-329, Exh. E; R2-334, Exh.; *Cuban spy indictment / Charges filed in downing of exile fliers / The Brothers to the Rescue Shootdown*: David Lyons, *Castro agent in Miami cited by U.S. grand jury*, Juan O. Tamayo, *Brothers to the Rescue Shootdown / Top spy planned Brothers ambush*, and Elaine de Valle, *Relatives: Charges fall short*, MIAMI HERALD, May 8, 1999, R2-334, Exh.; *Confessed Cuban spy receives seven years*, MIAMI HERALD, Jan. 29, 2000, at B1, R2-355 at C-2; *Contrite Cuban spy couple sentenced*, MIAMI HERALD, Feb. 3, 2000, at B5, R3-355 at D-2; *Miami Spy-Hunting*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. G-1; Carol Rosenberg, *Confessed Cuban spies sentenced to seven years*, MIAMI HERALD, Feb. 24, 2000, at 1B, R3-397, Exh. I-1; *Terrorism must not win in Brothers to the Rescue shoot-down*, MIAMI HERALD, Feb. 24, 2000, at 8B, R3-397, Exh. J-1 ("More than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down."); *Brothers Pilots Remembered* (photo), MIAMI HERALD, Feb. 25, 2000, at B1, R3-397, Exh. K-1; Marika Lynch, *Shot-down Brothers remembered*, MIAMI HERALD, Feb. 25, 2000, at 2B, R3-397, Exh. L-1.

issues were involved, including the Elian Gonzalez matter.<sup>22</sup> One of the articles, which addressed a bomb

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<sup>22</sup> R3-397, Exs.; R4-483, Exs.; R4-498, Exs.

During the same period of time in which the motions for change of venue were pending, and ultimately the trial was conducted, there was a substantial amount of publicity regarding other matters of interest in the Cuban community including the conditions in Cuba and high profile legal events occurring in Miami: the Elian Gonzalez matter; the arrest of an United States immigration agent, Mariano Faget, who was accused of spying for Cuba; and a city-county ban on doing business with Cuba.

As to the general anti-Castro sentiments and the conditions in Cuba: Juan O. Tamayo, *Former U.S. Pows Detail Torture by Cubans in Vietnam/Savage beatings bent captives to will of man dubbed "Fidel"*, MIAMI HERALD, Aug. 22, 1999, at A1, R2-329, Ex. I; Juan O. Tamayo, *Cuba toughens crackdown/"Biggest wave of repression so far this year"*, MIAMI HERALD, Nov. 11, 1999, at A1, R2-329, Ex. K; Juan O. Tamayo, *Witnesses link Castro, drugs*, MIAMI HERALD, Jan. 4, 2000, at B3, R2-329, Ex. J; Marika Lynch, *Castro-challenging pilot is offered parade, honors*, Jan. 4, 2000, at B1, R2-329, Ex. M; Jim Morin, *Cuba: I cannot speak my mind* (cartoon), MIAMI HERALD, Jan. 20, 2000, R2-329, Ex. P.

As to Elian Gonzalez: Juan O. Tamayo, *Castro Ultimatum/Return boy in 72 hours or migration talks at risk*, MIAMI HERALD, Dec. 6, 1999, at 1A, R2-329, Ex. N; Sara Olkon, Gail Epstein Nieves, Martin Merzer, *The Saga of Elian Gonzalez/Protest and Passion Spread to the Streets/Sit-ins block intersections and disrupt Dade traffic and Politicians, lawyers work to halt 6-year-old's return*, MIAMI HERALD, Jan. 7, 2000, 1A, *I see no basis for reversing decision, Reno says* and Sara Olkon,

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Anabelle de Gale, Marika Lynch, *Pained Cuban exiles disagree on what's best for Elian*, MIAMI HERALD, Jan. 7, 2000, at 17A, *U.S. Preparations for boy's return start slowly*, The Miami Herald, Jan. 7, 2000, at 18A, R2-329, Ex. O; *Peaceful Rally* (photo), MIAMI HERALD, Jan. 9, 2000, at 1A, R2-329, Ex. N; Jay Weaver, *3rd judge gets high profile in Elian case*, MIAMI HERALD, Feb. 23, 2000, at 1B, R3-397, Ex. A-1; Sandra Marquez Garcia, *Mary "appears" near Elian*, MIAMI HERALD, Mar. 26, 2000, at 1B, R4-483, Ex. E-3; Alfonso Chardy, *Authorities keep watch on exile groups*, MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. C-3; *Vigilant protestors*, MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. I-3; Andres Viglucci, Jay Weaver, and Frank Davies, *Dad gets visa, but no guarantees for Elian's transfer*, MIAMI HERALD, Apr. 5, 2000, at 1A, R4-483, Ex. D-3; Elaine de Valle, *Media watch events closely-and get watched in return/Hot words on radio scrutinized*, and Terry Jackson, *Media watch events closely-and get watched in return/TV talk, news shows flocking to South Florida*, MIAMI HERALD, Apr. 5, 2000 at 15A, R4-483, Ex. B-3; Karen Branch, *Crowds target Reno's home*, MIAMI HERALD, Apr. 6, 2000, at 2B, R4-483, Ex. A-3; *The saga of Elian/Reno wants Elian today/Boy must be at airport by 2 P.M./Defiant family refusing to comply*: Andres Viglucci, Jay Weaver, and Ana Acle, *Great-uncle challenges U.S. to take boy "by force"*, and Carol Rosenberg, *The Attorney general followed "instinct" as final mediator*, MIAMI HERALD, Apr.13, 2000, at 1A, R4-483, Ex. F-3; *The saga of Elian/Family defies order/Crowd swells at Little Havana home/Judge dismisses family's custody case/Panel will weigh request for a stay/U.S. takes no action to remove Elian*: Ana Acle, *In a show of solidarity, VIPs flock to visit boy*, and Andres Viglucci and Jay Weaver, *Reno: U.S. will explore all peaceful solutions*, MIAMI HERALD, Apr. 14, 2000, at 1A, R4-483, Ex. G-3; *Saga*



*of Elian / Standoff over custody / A show of solidarity* (photo), MIAMI HERALD, Apr, 14, 2000, at 20A, R4-483, Ex. H-3; Karl Ross, *W. Dade home of attorney general on alert, and Police say an anonymous caller phoned in bomb threat April 13*, MIAMI HERALD , Apr. 16, 2000, R4-498, Ex. A-4; *Raid's Prelude: How talks failed / Missed signals helped doom deal* and Sara Olkon, Diana Marrero, and Elaine de Valle, *Thousands protest seizure / Separate rally backs Reno's actions*, MIAMI HERALD , Apr. 30, 2000, at 1A, R4-498, Exh. C-4; Carol Rosenberg, *INS agent targeted by death threats*, MIAMI HERALD, May 6, 2000, R4-498, Exh. B-4; and *In memory of mothers who died at sea* (photo), MIAMI HERALD, R4-498, Exh. D-4.

As to Mariano Faget: Elaine de Valle, Fabiola Santiago, and Marika Lynch, *FBI: Official in INS spied for Cuba*, MIAMI HERALD, Feb. 18, 2000, at A1, R3-397 at C-1; Amy Driscoll, Juan Tamayo, *Spy bait taken instantly / Alleged Cuban agent phoned contact after receiving false FBI information*, Fabiola Santiago, *Aloof suspect with high clearance was ideally positioned to do harm, and Tracking Faget* (photos), MIAMI HERALD, Feb. 19, 2000, at A1, R3-397 at B-1; Don Bohning, *Faget's father was a brutal Batista official*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. G-1; Frank Davies, *Cuba, U.S. still fight Cold War*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Exh. H-1; Juan O. Tamayo, *Cuban diplomat expelled over spy link*, MIAMI HERALD , Feb. 20, 2000, at A1, R3-397, at D-1; Liz Balmaseda, *Spy case boosts worst suspicions*, MIAMI HERALD, Feb. 21, 2000, at B1, R3-397, at F-1; Juan O. Tamayo, *Cuban diplomat linked to Elian, INS spy case*, MIAMI HERALD , Feb. 22, 2000, at A1, R3-397, at E-1; Juan O. Tamayo, *More exiles maneuvering for business with Cuba*, MIAMI HERALD, Mar. 5, 2000, at A-1, R3-455 at A-2; Ana Radelat and Jan O. Tamayo, *FBI agents expel defiant Cuban envoy*, MIAMI HERALD, at A-1, R3-455 at B-2.

As to the business ban: Marika Lynch, Fernando Almanzar, *Protest, taping set to follow Van Van*

threat against the Attorney General of the United States following a collapse of talks in the Elian Gonzalez case, recited a history of anti-Castro exile group violence in the Miami-Dade community:

Scores of bomb threats and actual bombings have been attributed to anti-Castro exile groups dating back to the 1974 bombings of a Spanish-language publication, *Replica*. Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence.

In the early 1980s, the Mexican and Venezuelan consular offices were bombed in retaliation for their government's establishing relations with Cuba.

Since then, numerous small businesses-those promoting commerce, travel, or humanitarian

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*show*, MIAMI HERALD, Sept. 28, 1999, at 3B, and Tyler Bridges, Andres Viglucci, *Miami may bar Van Van next time / County's Penelas also opposed*, MIAMI HERALD, Oct. 13, 1999, at B1, R2-329, Exh. L; Don Finefrock, *Ban on business with Cuba tightened*, MIAMI HERALD, Feb. 25, 2000, at 2A, R3-397, Exh. M-1; Jordan Levin, *Miami-Dade threatens to cancel film fest grant / Cuban movie collides with county law*, MIAMI HERALD, Feb. 25, 2000, at 1A, R3-397, Exh. N-1; Jordan Levin, *Groups "warned" on Cuba resolution*, MIAMI HERALD, May 15, 2000, at 1B, R4-498, Exh. E-4; *Decenas De exiliados se congregaron ante la Corte Federal para reclamar el derecho de Elian Gonzalez a permanecer en EU*, R3-455, Exh. E-2.

aid to Cuba-have been targeted by bombers.<sup>23</sup>

The government responded to the change of venue motions that the Miami-Dade Hispanic population was a "heterogeneous," "highly diverse, even contentious" "group" immune from the influences which would preclude a fair trial.<sup>24</sup> Following oral arguments on 26 June 2000, the district court denied the motion without prejudice, finding that the defendants had failed to demonstrate that a change of venue was necessary to provide them with a fair trial by an impartial jury.<sup>25</sup> The district court "construed" the motions "as directed primarily toward the issue of 'pervasive community prejudice' " and focused its analysis on "the third inquiry set forth in" *Ross v. Hopper*, 716 F.2d 1528, 1541 (11th Cir.1983).<sup>26</sup> This third inquiry was defined as "sufficient evidence that the pretrial publicity has been 'so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice.'"<sup>27</sup> The court

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<sup>23</sup> R4-498, Ex. A-4.

<sup>24</sup> R3-443 at 11.

<sup>25</sup> *Hernandez*, 106 F. Supp. 2d at 1317-18; R5-586.

<sup>26</sup> *Id.* at 1321 n. 2.

<sup>27</sup> *Id.* at 1323-24. By limiting its analysis to the third inquiry of *Ross*, the district court necessarily limited its review of the defendants' evidence to consideration of whether that evidence demonstrated the prejudicial effect of pretrial publicity. See *Ross*, 716 F.2d at 1540. Further, as the en banc opinion states, the district court rejected the defendants' community survey and thus focused its analysis

“decline[d] to afford the survey and Professor Moran’s conclusions the weight attributed by Defendants” finding, *inter alia*, that the “size of the statistical sample ... [wa]s too small to be representative of the population of potential jurors in Miami-Dade County.”<sup>28</sup>

In September 2000, Campa moved for reconsideration of the denial of the motion for change of venue. In support of the reconsideration motion, he submitted news articles containing information that he provided the court both during an *ex parte* sidebar within the change of venue motion hearing and in his motion for leave to file his motions for foreign witness depositions *ex parte*.<sup>29</sup> He explained in the reconsideration motion that the information had been previously provided to the court *ex parte* because it disclosed the defendants’ theory of defense and that he sought the foreign witnesses to support that theory.<sup>30</sup> He argued that the news articles discussing “the defendants’ tacit admission that they were

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solely on the submitted articles. Contrary to the en banc opinion’s statement in n. 219 that the district court made a specific finding as to prejudice in the community, this finding was limited to its prior finding that the defendants’ evidence demonstrated “that the pretrial publicity has not been ‘so inflammatory and pervasive as to raise a presumption of prejudice’ among the potential jury venire in the case.” *Hernandez*, 106 F. Supp. 2d at 1322, 1324.

<sup>28</sup> *Id.*

<sup>29</sup> R5-656 at 2-3.

<sup>30</sup> *Id.* at 2.

keeping an eye on several extremist anti-Castro groups on behalf of the Cuban government, and that Cuban citizens and officials [we]re prepared to testify on behalf of the defendants" had aggravated the prejudice in the Miami community.<sup>31</sup> He noted that the articles characterized the defendants as Cuban agents who would call Cuban officials and citizens to testify on their behalf.<sup>32</sup> The district court denied reconsideration and invited the defendants to renew their motion after *voir dire*.<sup>33</sup>

### B. Voir Dire

The trial began with jury selection on 27 November 2000.<sup>34</sup> In phase one, 168 jurors were screened for problems such as language and hardship through a written questionnaire and oral *voir dire*

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<sup>31</sup> *Id.* at 3 (internal punctuation omitted).

<sup>32</sup> *Id.* The following articles were included as exhibits: Rui Ferreira, *Cuba helps defense at spy trial*, MIAMI HERALD, Aug. 18, 2000, at 1B, R5-656, Ex. A; Rui Ferreira, *Funcionarios cubanos irán al juicio de los espías*, NUEVO HERALD, Aug. 18, 2000, at 17A, R5-656, Exh. B; *Cuba colaborará en juicio por espionaje*, NUEVO DIARIO, Aug. 19, 2000, at 61, R5-656, Exh. C; Rui Ferreira, *Un misterioso coronel cubano se suma al caso de los espías*, NUEVO HERALD, Aug. 21, 2000, at 21A, R5-656, Exh. D; *To the point/Mr. President, define "handshake"*, MIAMI HERALD, Sept. 11, 2000, at 6B, R5-656, Exh. F; and *Accused spy seeks release of U.S. documents*, MIAMI HERALD, Sept. 12, 2000, at 33, R5-656, Exh. E.

<sup>33</sup> R6-723 at 2-3.

<sup>34</sup> R6-765.

questions.<sup>35</sup> In phase two, the 82 remaining prospective jurors were individually questioned regarding media exposure, knowledge and opinions of the case, the Castro government, the United States policy toward Cuba, the Elian Gonzalez case, the Cuban exile community and its reaction to the case, including a possible acquittal.<sup>36</sup>

The district court's concern for the media attention became an issue on the first day of *voir dire*. After learning that the jurors were exposed to a press conference held by the victims' families on the courthouse steps during the lunch break and that some of the jurors were approached by members of the press, the district court addressed isolating the jurors.<sup>37</sup> Acknowledging that there was a "tremendous amount of media attention" in the case, the district judge instituted a number of protections for the jury including instructing the government to speak to the victims' families about their conduct, extending the gag order to cover the witnesses and jurors, instructing the marshals to accompany the jurors as they left the building, and sealing the *voir dire* questions.<sup>38</sup>

Some venire members were clearly biased against Castro and the Cuban government and were

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<sup>35</sup> R6-766; R22.

<sup>36</sup> The district court disqualified 79 of the 168 venire persons for cause, 32(19%) in Phase 1 and 22(27%) in Phase 2 for Cuba-related animus.

<sup>37</sup> R22 at 111-16; R62 at 6575-76.

<sup>38</sup> R7-978 at 2-3, 7; R21 at 111-13, 117-19; R22 at 115, 119; R64 at 6459-60.



excused for cause.<sup>39</sup>

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<sup>39</sup> See R25 at 782, 789 (potential juror stated that she would not believe any witness who admitted that he had been a Cuban spy); R26 at 1068-70 (potential juror admitted that he "would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba—anything dealing with communism they are against," he would suspect that "they would have a strong opinion" on the trial. He explained that he

"probably would have a great deal of difficulty dealing with listening to the testimony .... would probably be a nervous wreck, ... and would have some trouble dealing with the case." He said that he "would be a little bit nervous and have some fear, actually fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large."); R27 at 1277 (potential juror expressed concern that, "no matter what the decision in this case, it is going to have a profound effect on lives both here and in Cuba." He believed that the Cuban government was "a repressive regime that needs to be overturned," was "very committed to the security of the United States," and "would certainly have some doubt about how much control [a member of the Cuban military] would have over what they would say [on the witness stand] without some tremendous concern for their own welfare."); R26 at 1057, 1059, 1073 (a potential juror who was a banker and senior vice president in charge of housing loans was "concern [ed] how ... public opinion might affect [his] ability to do his job" because he dealt with a lot of developers in the Hispanic community and knew that the case was "high profile enough that there

Other venire members indicated negative beliefs regarding Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury.<sup>40</sup> Three of these jurors ended up

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may be strong opinions" which could "affect his ability to generate loans."); R27 at 1166, 1168 (potential juror said that he did not like the Cuban government and asked "how could you believe" the testimony of an individual connected with the current Cuban government); R28 at 1452-53 (potential juror believed that "Fidel Castro is a dictator" and that there were "things going on in Cuba that the people are not happy about."); R26 at 1001-02 (potential juror thought that Castro had "messed up" Cuba which was "a very bad government ... perhaps one of the worst governments that exist ... on the planet.")

<sup>40</sup> See R25 at 880 (potential juror said she held a "[v]ery strong" opinion and did not believe in the Cuban system of government but did not feel that it would affect her ability to render a verdict); R25 at 829-31, 51-52 (potential juror thought she could be impartial, but admitted that "it would be difficult" and that she did not know if she "could be fair." She said that the case was discussed "every time my [Cuban born] parents have visitors over" and that she knew she would be "a little biased" in favor of the United States as she did not agree with "communism."); R27 at 1240-47 (potential juror, who was born in Cuba and immigrated to the United States with her family in the late 1950s-early 1960s, had three relatives who were involved in the Bay of Pigs invasion and her husband had participated in the 1980 Mariel boat lift to rescue his sister and her family from Cuba. Although she stated that she would be impartial, she said that she saw "Castro as a dictator."); R25 at 790-96 (potential juror, a Cuban

immigrant, said that she did "not approve of the regime ... in Cuba" and was "against communism" but believed she could serve impartially. She remembered the news from the television and the Miami Herald about the planes being shot down); R27 at 1227-32 (potential juror said that, although her father left Cuba because of communism and she believed that the Cuban government was "oppressive," she believed that she would not be prejudiced); R27 at 1148-50 (potential juror who was born in Cuba and immigrated to the United States with her family stated that she was "always for the U.S." and "against the Republic of Cuba," did not like Cuba being a communist country, and had relatives living in Cuba. She had a problem with the case because it involved "espionage against the U.S." but indicated that she could set aside her feelings to serve on the jury); R26 at 1011-13, 1018-19 (potential juror commented that he had "no prejudices" but "live[d] in a neighborhood where there [we]re a lot of Cubans" and was "acquainted with people that come from Cuba. That is universal in Dade County." When asked whether he would be concerned about community sentiment if he were chosen as a juror, he "answer[ed] ... with some care .... [i]f the case were to get a lot of publicity, it could become quite volatile and ... people in the community would probably have things to say about it." He stated that "it would be difficult given the community in which we live" "to avoid hearing somebody express an opinion" on the case and to follow a court's instruction to not read, listen to, or otherwise expose himself to information about the case. His opinion about the Cuban government was "not favorable" as it was "not a democracy" and was "guilty of assorted [human rights] crimes."); R26 at 1021-28, 1030, 10323223, (potential juror initially said that he did not "think he would have any sort of prejudice[ ]" against defendants who were agents of

the Cuban government but could not say for certain because of "[t]he environment that we are in. This being Miami. There is so much talk about Cuba here. So many strong opinions either way." He later, however, admitted to having biases against the Cuban government, which he believed was "anti-American" and "tyrannical," and to having "an obvious mistrust ... of those affiliated with the [Cuban] government." He also indicated that he would be concerned about returning a not guilty verdict because "a lot of the people [in Miami] are so right wing fascist," because he would face "personal criticism" and media coverage, and because he had concerns for what might happen after a verdict was returned. He believed the case to be "a high profile case" and that he had been videotaped by the media when leaving the courthouse.); R27 at 1139-48 (potential juror who was born in Cuba and immigrated to the United States with his parents initially stated that he did not think he "could make a fair judgment" in the case and would be prejudiced because he had "a lot of family ties in Cuba" including uncles, aunts, and cousins but later answered that he could set aside his concerns if selected for the jury. He was troubled about returning a verdict in the case based on his concern for something happening to his "family ... in Cuba" and the notoriety of the case in Miami. He also said that he had "heard a lot about the case ... on the news [and from] people talking about" it); R28 at 1424-25, 1433 (potential juror believed that Castro was "a very bad person" and, when asked whether her opinion regarding the Cuban government would affect her ability to fairly weigh the evidence, answered "I don't think so .... I don't know. I have lived in South Florida for 36 years and I have seen many changes." She had known one of the passengers in one of the BTTR planes on the day of the shoot-down and who was named as a

seated on the jury, and one served as the foreperson.<sup>41</sup> The district court denied the defendants'

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government witness, for about eight years. She also knew that the witness was "very involved with the Brothers to the Rescue and very strongly keeping the Cuban community together in Miami."); R25 at 818-22 (potential juror did not think that it would affect his ability to be impartial but he "was not happy" with United States-Cuban relations following the Mariel boat lift. He did not like the freedom that Cubans had to immigrate to the United States because immigrants from other countries were treated differently and "sometimes [he felt like] a stranger in [his] own country" when he needed to ask someone to speak English instead of Spanish); R27 at 1118-28, 1175-77 (potential juror had "many close Cuban friends," including her husband's business partner who was a member of a group that rescued Cubans fleeing the island. She believed that she could be impartial but had concerns about returning a verdict in Miami "because of the Cuban population here." She "was a little distressed with the way that the [Cuban] exile community handled" the Elian Gonzalez matter because she did not "like the crowd mentality, the mob mentality that interferes with what I feel is a working system." She strongly believed that the Cuban government was an oppressive dictatorship. She remembered news reports regarding "the planes being shot down" and several men dying, and that it was a "very bad situation" and frightening because of the possibility of military action. Leilani Triana testified that, although her parents were from Cuba and her grandfather had been politically involved in Cuba before Castro, she could be impartial).

<sup>41</sup> See R24 at 555, 561-62, 571, 590; R25 at 741-49. David Buker, who served as jury foreperson, stated that he believed that "Castro is a communist dictator

request to excuse one potential juror, who admitted that she knew the daughter of one of the downed pilots, had visited the pilot's home, and had attended his funeral.<sup>42</sup>

Finally, other venire members espoused indifference toward Castro or the Cuban government.<sup>43</sup>

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and I am opposed to communism so I would like to see him gone and a democracy established in Cuba." Although the government notes that Campa's attorney commented that Buker was "uninvolved or personally disconnected from the experience [of a Cuban]" and that his "general philosophical problem with communism" was "perfectly okay," Campa's attorney's comment was made in the context of his argument concerning striking for cause another juror whose responses were "rooted in personal experience." R25 at 851.

Both Sonia Portalatin, who had a "strong" opinion about the Cuban government because she was "against communism," R24 at 619; R25 at 858-65, and Eugene Yagle, who admitted having "a strong opinion" about the Cuban government as he could not "reconcile [him]self to that form of Government," R22 at 144, 165-67; R27 at 1294-1300; R28 at 1517-20; R29 at 1553-57, 1601-02, 1638, were seated on the jury.

<sup>42</sup> R24 at 519-22, 534-36. The potential juror was the principal of the predominantly (90 percent) Cuban high school attended by the daughter of one of the killed BTTR pilots. She visited the pilot's home and attended his funeral. Despite her relationship with the pilot's daughter, she thought she "could be fair" although "it would be a little difficult."

<sup>43</sup> See R25 at 841-43, 846 (potential juror had traveled to Cuba with his family "to take goods" and



Some of the potential jurors who had personal contact with the victims, their family members, BTTR, government witnesses, or the parties were not questioned during Phase II or were excused for cause.<sup>44</sup> Following *voir dire*, Medina's attorney

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medicines to friends and had friends who frequently traveled to Cuba; he knew of no reasons why he should not serve on the jury. He remembered hearing or reading "years back" "something about Brothers to the Rescue" and someone in the group who was a spy for the Cuban government); R27 at 1300-08 (potential juror who had family in Cuba thought he could be fair, but was unable to say whether he would be able to believe a witness who was a member of the communist party in Cuba); R27 at 1134-39 (potential juror whose parents and grandparents had immigrated from Cuba and who had distant relatives who remained in Cuba but he had no opinions regarding the Cuban government, the trial, or the publicity surrounding it); R26 at 990-06 (potential juror felt sympathy for the people living in Cuba but believed that she would be impartial as a juror. She knew from the media that "airplanes were shot down in Cuba a couple of years ago" and that "some families ... gathered to remember the anniversary of the incident" a few weeks before *voir dire* ); R26 at 938, 945 (potential juror had concerns about community reaction to a verdict because she did not "want rioting and stuff to happen like what happened with the Elian case. I thought that got out of hand.").

<sup>44</sup> See R21 at 139; R23 at 251, 254; R24 at 373, 385-86, 458, 508-10 (three potential jurors knew government witness Jose Basulto, another knew a widow of one of the killed BTTR pilots, and a third knew the daughter of one of the BTTR victims); R25 at 776-70, 809-12; R26 at 937-41 (potential juror who

complimented the district court on the conduct of *voir dire* but indicated his concerns that there were three women seated on the jury who exemplified Professor Moran's opinion that certain community members who were subjected to community pressures were unable to admit their underlying prejudices.<sup>45</sup>

From the beginning of *voir dire* until the completion of the trial, the prospective and actual jurors were admonished not to discuss the case with anyone and to have no contact with media accounts or anything else related to the case.<sup>46</sup> The jurors were also instructed about the presumption of innocence.<sup>47</sup> The district court limited the sketching of witnesses for their protection.<sup>48</sup> It permitted, however, the media "access to all the evidence admitted into the trial record."<sup>49</sup>

### *C. The Evidence at Trial*

As the *en banc* opinion states, the defendants were members of a Cuban government intelligence

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was a former national bank examiner had assisted the United States Attorney's office in Miami for three years during a grand jury investigation); R25 at 655, 690, 709 (potential juror knew many of the named witnesses, and had helped raise money for BTTR while working for one of the local Cuban radio stations).

<sup>45</sup> R27 at 1373-76.

<sup>46</sup> R21 at 44-45; R22 at 119; R116 at 13492-93.

<sup>47</sup> R21 at 26.

<sup>48</sup> R9-1126.

<sup>49</sup> *Hernandez*, 124 F. Supp. 2d 698, 704 (S.D. Fla.2000); R7-800.

operation that maintained a spy operation in South Florida. Campa, Hernandez, and Medina falsely identified themselves through elaborate "legends," or biographies, and back-up or "reserve" identities when they dealt with United States border and law enforcement personnel and when they obtained driver licenses, passports, and other identification.<sup>50</sup> Some of their assigned duties included infiltrating, monitoring, and disrupting the work of certain militant Cuban exiles in South Florida, reporting on anti-Castro organizations in Miami-Dade County, and infiltrating United States military and government agencies and reporting on operations at certain United States military installations.<sup>51</sup>

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<sup>50</sup> R33 at 2145; R34 at 2321-40; R44 at 3724-26; R49 at 4677-78; R66 at 6833-35; R69 at 6981-7016 Govt. Exs. 4; 5-1; 5-2; 5-3; 5-4; 5-6; 6; 7; 9; 8-1; 8-3; 8-4; 11; 12-3; 12-4; 12-5; 12-8; DAV 110 at 2, 118 at 7-14; DG 105 at 2-16; DG 125; DG 126 at 9-10; DG 135 at 3-11; DG 136; SF 14; SF 15; SG 34; SG 53. Under their false identities, Campa was also known as Fernando Gonzalez Llort, Oscar, or Vicky, R101 at 11714; Gonzalez was known as Agent Castor; Guerrero was known as Lorient, Govt. Exs. DAV 102 at 1; DAV 129 at 2; Hernandez was known as Girardo, Giro, or Manuel; and Medina was known as Allan or Ramon Labanino; R101 at 11721-23.

<sup>51</sup> R45 at 3870-71; Govt. Exs. DAV 109 at 6-7; DG 101 at 2; DG 102 at 30; DG 107 at 12-20, 58-67; DG 108 at 2-3; DG 117; DG 129; DG 137 at 2; HF 103. The Cuban government maintains the following intelligence operations: the Directorate of Military Intelligence ("DIM") under the Ministry of Revolutionary Armed Forces, and the Directorate of Intelligence ("DI") and the Directorate of

The Cuban exile groups of concern to the Cuban government included Alpha 66,<sup>52</sup> Brigade 2506,

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Counterintelligence ("DCI") under the Ministry of the Interior. R44 at 3700-05, 3707. The DI collects intelligence outside of Cuba, focusing primarily on the United States; the DCI is responsible for intelligence regarding counter-revolutionary activities inside of Cuba. R44 at 3704, 3707. The DI is organized into many operational components, including M-I which handles non-military United States government agency intelligence, M-III which handles the collecting, correlating, and reporting of gathered information, M-V which handles the operation and support of "illegal" intelligence officers ("IO" s) who enter the United States illegally with a false identity and identification, M-XIX which handles counter-revolutionary individuals and organizations outside of Cuba. R44 at 3708-11, 3713; R46 at 3957.

<sup>52</sup> Orlando Suarez Pineiro, a Cuban-born permanent resident of the United States, served as a captain in Alpha 66 for about six years. R90 at 10373-74. On 20 May 1993, he and other Alpha 66 members were arrested while on board a boat with weapons in the Florida Keys. *Id.* at 10391-92, 10397-401, 10415-16. The weapons included pistols with magazines and ammunition, 50 caliber machine guns with ammunition, rifles with clips, and an RK. *Id.* at 10397-400. Pineiro was tried and found not guilty of possession of a Norinko AK 47 rifle and two pipe bombs. *Id.* at 10424. Pineiro and other Alpha 66 members were also stopped and released while on board a boat on 10 June 1994, but their weapons and boat were seized. *Id.* at 10409, 10411-14. The seized weapons included a machine gun and AK 47s. *Id.* at 10411-14.

United States Customs Agent Ray Crump testified that, on 20 May 1993, he participated in the arrest of

several men whose boat was moored at a marina in Marathon, Florida. *Id.* at 10429. The boat held: several handguns; automatic rifles, including one fully automatic rifle; four grenades; two pipe bombs; a 40 millimeter grenade launcher; a 50 caliber Baretta semiautomatic rifle; and a bottle printed with "Alpha 66" which contained "Hispanic propaganda ..., ... crayons, razors, stuff of that nature." *Id.* at 10431-33, 10434. He also participated in an investigation of a vessel south of Little Torch Key, about ten miles south of Marathon, Florida, on 11 July 1993. *Id.* at 10433-34. The vessel was carrying four men, numerous weapons, and "Alpha 66 type propaganda." *Id.* at 10434. The weapons on the vessel included an AR 15, two 7.6 millimeter rifles and ammunition magazines. *Id.* at 10438. Following this investigation, the men were not arrested, and the weapons and vessel were not seized. *Id.* at 10438-39.

United States Customs Agent Rocco Marco said that he encountered four anti-Castro militants on 27 October 1997, after their vessel, the "Esperanza", was stopped in waters off Puerto Rico. R90-10449. He explained that U.S. Coast Guard officers searched the vessel and found weapons and ammunition "hidden in a false compartment underneath the stairwell leading to the lower deck." The officers found food, water bottles, camouflage military apparel, night vision goggles, communications equipment, binoculars, two Biretta 50 caliber semiautomatic rifle with 70 rounds of ammunition, ten rounds of 357 hand gun ammunition, and magazines and clips for the firearms. R90 at 10453-59. The leader of the group, Angel Manuel Alfonso of Alpha 66, confessed to Rocco that they were on their way to assassinate Castro at ILA Marguarita, where he was scheduled to give a speech. *Id.* at 10452, 10467. Alfonso explained to Rocco that "his purpose in life was to kill [Castro]" and that it did not "matter if he went to jail or not. He would come back and accomplish the mission." *Id.* at 10468.

Debbie McMullen, the chief investigator with the Federal

BTTR, Independent and Democratic Cuba ("CID"), Commandos F4,<sup>53</sup> Commandos L, CANF,<sup>54</sup> the Cuban

Public Defender's Office, testified that Ruben Dario Lopez-Castro was an individual associated with a number of anti-Castro organizations, including PUND and Alpha 66. R97 at 11267. Lopez and Orlando Bosch planned to ship weapons into Cuba for an assassination attempt on Castro. *Id.* at 11254. Bosch had a long history of terrorist acts against Cuba, and prosecutions and convictions for terrorist-related activities in the United States and in other countries. Campa Exh. R77 at 18-35.

<sup>53</sup> Rodolfo Frometa testified that, although he was born in Cuba, he was a citizen of the United States. R91 at 10531. He explained that he was a United States representative of a Cuban organization called Commandos F4, which was organized "to bring about political change in a peaceful way in Cuba" and included members both inside of and exiled from Cuban. *Id.* at 10532. He identified himself as the Commandate Jefe, or commander-in-chief, of F4 in the United States. *Id.* at 10534. He stated that, since 1994, all F4 members must sign a pledge that they will "respect the United States laws" and not violate either Florida or federal law. *Id.* at 10535.

Frometa stated that, before Commandos F4, he was involved with Alpha 66, another organization supporting political change in Cuba, from 1968 to 1994 and served as their commander "because of his firm and staunch position ... against Castro." R91 at 10541-42. As a member of Alpha 66, Frometa was stopped by police officers and questioned regarding his possession of weapons. He was first stopped on 19 October 1993, while in a boat which had been towed to Marathon, Florida, and was questioned regarding the onboard weapons. *Id.* at 10564-66. The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini 14 rifle caliber 223 with a scope. *Id.* at 10564-66. On 23 October 1993, he was again stopped while he and others were driving a truck which was pulling a boat



toward the Florida Keys. *Id.* at 10542-44. Frometa explained that they were carrying weapons to conduct a military training exercise in order to prepare for political changes in Cuba or in the case of a Cuban attack on the United States, and once the officers determined that their activities were legal, they were sent on their way. *Id.* at 10544-48, 10563. The weapons were semi-automatic and included an R15, an AK 47, and a 50 caliber machine gun. *Id.* at 10545-47. Frometa and several other Alpha 66 members were once more stopped and released on 7 February 1994 for having weapons on board his boat. Because a photograph of the group was "published in the newspapers" "[e]verybody in Miami" knew that they were released. *Id.* at 10569. On 2 June 1994, Frometa, by then a member of F4, was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" in order to kill Castro and his close associates in Cuba. *Id.* at 10571-72, 10574-76, 10579-80. Frometa acknowledged that the use of the C4 explosive could have injured Cubans who worked at a military installation, *Id.* at 10579, but that they had caused the "death of four U.S. citizens, the 41 people including 20 or 21 children who died; the mother of the child Elian, plus thousands and thousands who have died in the Straits of Florida." *Id.* at 91-10581.

<sup>54</sup> Percy Francisco Alvarado Godoy and Juan Francisco Fernandez Gomez testified by deposition. R95 at 11012; R99 at 11558-59. Godoy, a Guatemalan citizen residing in Cuba, described attempts between 1993 and 1997 by affiliates of the CANF to recruit him to engage in violent activities against several Cuban targets. 2SR-708, Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64. He said that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. *Id.* at 44-46. In connection with the same plot, he flew to Guatemala in November 1994 to obtain the explosives and detonators to be

American Military Council ("CAMCO"), the Ex Club, Partido de Unidad Nacional Democratica ("PUND") or the National Democratic Unity Party ("NDUP"), and United Command for Liberation ("CLU").<sup>55</sup>

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used and met with, among others, Luis Posada Carriles, a Cuban exile with a long history of violent acts against Cuba. *Id.* at 49, 52, 56-58. Unknown to the CANF members, Godoy was cooperating with the Cuban authorities, denounced their plans, and later testified at the trial of one of the conspirators in Cuba. *Id.* at 22, 24, 26, 31, 58-59, 65, 70, 76, 81-82, 86, 90, 109.

Gomez, a citizen and resident of Cuba, described numerous attempts between 1993 and 1997 by persons associated with the CANF to recruit him to engage in violent activities against several Cuban targets. Gomez also testified that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. In 1996 and 1998, Gomez was approached by Borges Paz of the anti-Castro organization the Ex Club, 2SR-708, Att. 1 at 9, 12-14, 20, 39; Gomez said that Paz invited him to join their organization to build and place bombs at tourist hotels and at the Che Guevara Memorial in Santa Clara, Cuba. *Id.* at 16, 19, 22. After returning to Cuba, Gomez informed the Cuban authorities of the Ex Club's plans. *Id.* at 20, 35-36. As a result of his work for the United States government, Gomez said that he was estranged from his family in the United States, including a daughter in Florida, and had received threatening phone calls. *Id.* at 64-66.

<sup>55</sup> R83 at 9162, 9165-67; R90 at 10373-74, 10391-92, 10397-10401, 10409, 10411-14, 10415-16, 10429, 10431-34, 10449, 10452-59, 10467-68; R91 at 10541-42, 10544-48, 10563-66, 10571-72, 10574-76, 10579-80; R97 at 11267, 11291-97; 2SR-708, Att. 1 at 9, 12-14, 16, 19-20, 22, 35-36, 39; Att. 2 at 10-13, 21-24,

Alpha-66 ran a paramilitary camp training participants for an invasion of Cuba, had been involved in terrorist attacks on Cuban hotels in 1992, 1994, and 1995, had attempted to smuggle hand grenades into Cuba in March 1993, and had issued threats against Cuban tourists and installations in November 1993. Alpha-66 members were intercepted on their way to assassinate Castro in 1997. Brigade 2506 ran a youth paramilitary camp.<sup>56</sup> BTTR flew into Cuban air space from 1994 to 1996 to drop messages and leaflets promoting the overthrow of Castro's government. CID was suspected of involvement with an assassination attempt against Castro. Commandos F4 was involved in an assassination attempt against Castro. Commandos L claimed responsibility for a terrorist attack in 1992 at a hotel in Havana. CANF planned to bomb a nightclub in Cuba. The Ex Club planned to bomb tourist hotels and a memorial. PUND planned to ship weapons for an assassination attempt on Castro. Following each attack, Cuba had advised the United States of its investigations and had asked the United States' authorities to take action against the groups operating from inside the United States.<sup>57</sup>

The BTTR's flights over Cuba were of particular concern to the Cuban government, and the Cuban government had communicated that concern and its

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27-28, 33-34, 44-46, 61, 63-64; Campa Exs. R-29D, R-29F, R-29G, R-29H.

<sup>56</sup> R97 at 11296-97.

<sup>57</sup> Campa Exs. R-29C; R-29F; R-29H; GH Exs. 16C, 24.

plan to use force to interrupt the flights to the Federal Aviation Administration ("FAA"), which shared that information with BTTR.<sup>58</sup> BTTR's flights, however, continued until the shootdown in February 1996.<sup>59</sup> The downing of the two BTTR planes was observed both by occupants of a fishing boat and by the crew and passengers onboard a cruise ship.<sup>60</sup> The bodies of the people in the aircraft, three of whom were United States citizens, were never recovered. Both planes were in international airspace, flying away from Cuba, when they were shot down; they had not entered Cuban airspace.<sup>61</sup>

Lieutenant Colonel Roberto Hernandez Caballero, of the Ministry of Cuba Department of State Security, testified that he investigated a number of terrorist acts in Havana and in other

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<sup>58</sup> R76 at 8198-99, 8203-05; R83 at 9166-67; GH Exs. 18E, 18F.

<sup>59</sup> R58 at 5919, 5922-23; R83 at 9161-65, 9167-70, 9181-83; GH Exs. 18E, 37 at 2-4, 6-8; Govt. Exs. 475A at 2-3, 478, 479, 483 at 8-11, 14-16; HF 108 at G-3, 113 at G-3.

<sup>60</sup> R53 at 5109-14, 5117-18; Govt. Ex. 483 at 5-7, 11, 13, 17-18, 20. The cruise ship was Royal Caribbean's "Majesty of the Seas" with about 2,600 passengers and 800 crew. R53 at 5084-86. The first officer on the ship explained that they were on the last leg of a weekly cruise about 24 nautical miles off the north coast of Cuba during the shootdowns. *Id.* at 5087-89, 5109-14. A videotape of the shootdowns made by a cruise ship passenger was apparently "played on TV many times." *Id.* at 5124.

<sup>61</sup> R53 at 5113-21, 5131-33; Govt Exs. 440, 469B, 484.

locations at Cuban-owned facilities during 1997.<sup>62</sup> He advised Medina of the attacks in April and directed that he search for any connection between the attacks and CAMCO.<sup>63</sup> In September, Hernandez notified the Cuban authorities that he had received information that one of the perpetrators of one of the bombings was available to meet for lunch and that he

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<sup>62</sup> R93 at 10750-51, 10754-55, 10783-832. The acts included an explosion on 12 April 1997 which destroyed the bathroom and dance floor at the discotheque Ache in the Media Cohiba Hotel, *Id.* at 10755, 10757, 10759; a bombing on 25 April 1997 at the Cubanacan offices in Mexico, R97 at 11318-19; the 30 April 1997 explosive device found on the 15th floor of the Cohiba Hotel, R93 at 10766-69, 10771; the 12 July 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies and did significant damage inside the hotels, *Id.* at 10786-88, 10795-801; the 4 August 1997 explosion at the Cohiba Hotel which created a crater in the lobby and destroyed furniture; *Id.* at 10802-05; explosions on 4 September 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant, *Id.* at 10807-09, 10820; and, the discovery of explosive devices at the San Jose Marti International Airport in a tourist van in the taxi dispatch area on 19 October 1997 and underneath a kiosk on 30 October 1997, *Id.* at 10824-30. The explosions on 4 September killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused property damage at all locations. *Id.* at 10809-13, 10815-20, 10822-23.

<sup>63</sup> R97 at 11316-18; Campa Exs. R57(a), R57(b) at 2, 59.

understood that another large building in Cuba was targeted for the next week.<sup>64</sup> Hernandez's contact was instructed to elaborate on the information that he had obtained.<sup>65</sup> As a result of the investigations, Caballero said that the Cuban Department of State Security arrested some individuals, but that they believed some of the individuals responsible for financing, planning, and organizing the explosions lived in the United States and had not been arrested.<sup>66</sup> He explained that he provided FBI agents with documentation and investigation materials regarding the terrorist acts between 1990 and 1998, and received the FBI's findings in March 1999. During the trial, the government described the Cuban intelligence operations as "an intelligence pyramid" headed by Fidel Castro.<sup>67</sup> It suggested that the Cuban government applied the death penalty for throwing things out of airplane windows,<sup>68</sup> and was

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<sup>64</sup> R97 at 11320-21.

<sup>65</sup> *Id.* at 11321; Campa Ex. R63 at 1.

<sup>66</sup> R93 at 10832, 10839, 10842.

<sup>67</sup> R44 at 3699-700. The U.S. Attorney asked government witness Stuart Hoyt to describe the structure of the Cuban intelligence system by questioning "who is at the top of the Cuban intelligence system." R44 at 3699. Hoyt responded by stating that "Fidel Castro" was at the top as "Commander-in-Chief", "[P]resident", "Council Minister", and "head of the Cuban Communist Party." *Id.*

<sup>68</sup> R73 at 7806-07.



“repressive”<sup>69</sup> and a “dictatorship.”<sup>70</sup>

*D. Renewed Motions for Change of Venue*

During the trial, the motions for change of venue were renewed through motions for a mistrial based on community events and trial publicity and a government witness’s insinuation that a defense attorney was a spy or a communist.<sup>71</sup> In February

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<sup>69</sup> R80 at 8748. After a defense witness explained on cross-examination that the tone of the dissenters within Cuba was “more respectful” than that of Cuban exile organizations located outside of Cuba, the government attorney asked whether such an answer was relevant when it was a “[p]articularly repressive government.” R80 at 8748. Late, after the witness stated that, if he had been a dictator, he would have tried to stop the BTTR flight, the government attorney questioned whether “[w]e live in a dictatorship.” *Id.* at 8754. After the witness replied “Fortunately we don’t,” the government attorney commented, “And people do have that freedom of choice.” *Id.*

<sup>70</sup> *Id.* at 8754.

<sup>71</sup> R70 at 7130-36; R81 at 8947-49. Although the district court did not overtly deny these motions, the motion based on community events and publicity was apparently resolved by “no response” to an inquiry to the jury as to whether they had “seen, heard, read, or [spoken to anyone] about any media accounts related” to the case following the trial’s last recess. R70 at 7136. The motion based on the witness’s insinuation was resolved by an instruction to the jury that the defense attorney’s “job [wa]s to provide a vigorous defense for his client.” R81 at 8955. “[The witness]’s statement regarding [the defense attorney] was inappropriate and unfounded.” *Id.* at 8949.

2001, Campa moved for a mistrial and renewed his motion for a change of venue based on the commemorative flights honoring the fifth anniversary of the shutdown and the related television interviews and newspaper articles during the weekend of 24 February 2001.<sup>72</sup> He argued that the newspapers included "an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act" and articles including quotations from CANF members discussing "at length" the facts of the trial.<sup>73</sup> He maintained that a jury instruction would not cure the taint of these events and publicity.<sup>74</sup> The court reserved ruling pending supplementation of the record and then, upon the defendants' request, questioned the jury as to their exposure to the news articles.<sup>75</sup> When none of the jurors responded in any way, the case proceeded.<sup>76</sup>

Two weeks later, Campa, Gonzalez, Hernandez, and Medina filed a joint motion for a mistrial and change of venue arguing that the 24 February weekend events were so prejudicial that it could not be cured by voir dire or instructions.<sup>77</sup>

Defense witness Basulto responded to questioning by asking Hernandez's defense counsel

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<sup>72</sup> R70 at 7130.

<sup>73</sup> *Id.* at 7130-31.

<sup>74</sup> *Id.* at 7131.

<sup>75</sup> *Id.* at 7134-36.

<sup>76</sup> *Id.* at 7136.

<sup>77</sup> *Id.* at 5.

whether he was "doing the work" of the Cuban intelligence community.<sup>78</sup> At the request of Hernandez's attorney, the trial judge struck the comment and the jury was instructed to disregard the comment.<sup>79</sup> Following a recess, Campa's counsel argued that Basulto's insinuation was:

precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue, and ... in the aftermath of the events of February 24, 2001, we renewed our motion for ... a change of venue based on the pretrial publicity, the publicity that has been generated during the course of the trial and our concern with our ability to obtain a fair trial in this community given that background.

This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is doing his job, of being a communist. It is unfortunate, it is the type of red baiting we have seen in this community before and we are concerned how it affects the jury. Here we are asking the jury to make a decision based on the evidence and only based on testimony and we are left and they are left with wondering what will they be accused. *These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who*

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<sup>78</sup> R81 at 8945.

<sup>79</sup> *Id.*

*hold positions of authority in this community, who have access to the media, are going to call them of being Castro sympathizers, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial.*

When someone can on the stand gratuitously and maliciously accuse [Hernandez's attorney] of being a spy[, it] sends a message to these ladies and gentlemen if they don't do what is correct, they will be accused of being communists too. These people have to go back to their homes, their jobs, their community and you can't function in this town if you have been labeled a communist, specially by someone of Mr. Basulto's stature.<sup>80</sup>

He asked that the court consider this event and the other events in its consideration of the pending motion for change of venue.<sup>81</sup>

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<sup>80</sup> *Id.* at 8947-49 (emphasis added). Basulto, the founder, president, and director of BTTR, was a Cuban-American who had worked with the Central Intelligence Agency to infiltrate the Cuban government. He was a prominent person in Miami, and made frequent appearances in Spanish-language media. During the trial, he testified that his work for the CIA was "dedicated to promot[ing] democracy in Cuba." R80 at 8822, 8825.

<sup>81</sup> *Id.* at 8949. In the alternative, counsel for Campa and Hernandez requested a jury instruction

In May 2001, the district court denied the pending motions for change of venue on the basis of its earlier orders denying a change of venue and upon its finding that the 24 February events and the publicity surrounding it did not necessitate a change of venue because of its instructions to the jury.<sup>82</sup>

During closing arguments, the government made a number of comments to which the defendants objected. It stated that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they convicted the "Cuban sp[ies] sent to ... destroy the United States."<sup>83</sup> It maintained that the Cuban government sponsored "book bombs," "telephone threats of car bombs," and "sabotage," and "killed four innocent people."<sup>84</sup> It suggested that the Cuban government used "goon squads" to torture its critics.<sup>85</sup> It asserted that the Cuban government had their agents falsify their identities by using the identification of "dead babies" and "stealing the

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addressing Basulto's attack on Hernandez's counsel's credibility. R81 at 8949-53. The court found that the statements could affect "how the jurors view" Hernandez's counsel and instructed the jury that Hernandez's attorney's "job is to provide a vigorous defense for his client. Mr. Basulto's statement regarding [Hernandez's counsel] was inappropriate and unfounded." *Id.* at 8955.

<sup>82</sup> R120 at 13894-95.

<sup>83</sup> *Id.* at 14532, 14481.

<sup>84</sup> *Id.* at 14480.

<sup>85</sup> *Id.* at 14495.

memories of families.”<sup>86</sup> It contended that the defense argument that the agents were in the United States to keep an eye on the Cuban exile groups was false because they were on United States military bases, spying on United States military, the FBI, and Congress.<sup>87</sup> The government implied that the government of Cuba was not cooperating with the FBI.<sup>88</sup> It commented that Cuba “was not alone” in shooting down civilian aircraft as they “are friends with our enemies,” including “the Chinese and the Russians,” and compared the BTTR shootdown to the 1986 Libyan shootdown of a civilian aircraft.<sup>89</sup> It maintained that the government of Cuba did not care about the occupants of the planes, and that it shot down the planes even though they could have forced Basulto’s plane to land.<sup>90</sup> It argued that Cuba was a “repressive regime [that] doesn’t believe in any [human] rights.”<sup>91</sup> It summarized that the defendants had joined an “intelligence bureau ... that sees the United States of America as its prime and main enemy” and that the jury was “not operating under the rule of Cuba, thank God.”<sup>92</sup> The defendants’ objections were sustained, and the jury was instructed to consider only the evidence admitted

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<sup>86</sup> *Id.* at 14480-81.

<sup>87</sup> *Id.* at 14483-85, 14488.

<sup>88</sup> *Id.* at 14493.

<sup>89</sup> *Id.* at 14512-13.

<sup>90</sup> *Id.* at 14513.

<sup>91</sup> *Id.* at 14519.

<sup>92</sup> *Id.* at 14475.



during the trial and to remember that the lawyers' comments were not evidence.<sup>93</sup>

*E. Jury Conduct and Concerns During the Trial*

Five months into the trial, when one seated juror had a two-day conflict, the court discussed the possibility of removing that juror and seating one of the alternates.<sup>94</sup> Hernandez's attorney requested a recess, arguing that the parties and the court had worked very hard to select "a jury we are very happy with" and maintained that it would be unreasonable to refuse to accommodate the juror after her length of service and her request to complete the trial.<sup>95</sup> The district court granted the recess.<sup>96</sup>

In early February 2001, a small protest related to the trial was held outside of the courthouse, but the jury was protected from contact with the protestors and from exposure to the demonstration.<sup>97</sup> On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building.<sup>98</sup> Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during

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<sup>93</sup> *Id.* at 14482, 14483, 14493; R125 at 14583.

<sup>94</sup> R104 at 12091-92.

<sup>95</sup> *Id.* at 12091-94.

<sup>96</sup> *Id.* at 12094-95.

<sup>97</sup> R59 at 6096-108, 6145-49. The 20 protestors carried signs stating "take Castro down," "[f]air trial wanted," and "spies to be killed." *Id.* at 6145.

<sup>98</sup> R81 at 9005.

the deliberations and that footage was televised.<sup>99</sup> Some of the jurors indicated that they felt pressured; therefore, the district court again modified the jurors' entry and their exit from the courthouse and transportation.<sup>100</sup> However, the Metrorail Center, where the jurors using public transportation were taken, is the site of a prominently displayed monument to the shutdown victims.

As the *en banc* opinion states, the jurors were again filmed entering and leaving the courthouse "all the way to their cars" during the deliberations.<sup>101</sup> The district judge arranged for their entrance into the courthouse by private entrance and guarded transportation to their vehicles or to mass transit. The electronic eyes of the community were focused upon them and the jury could not help but understand that focus.

#### F. *Post-Trial Motions for New Trial*

Following the trial, in late July and early August 2001, Campa, Gonzalez, Guerrero, and Medina moved for a new trial and renewed their motions for a change of venue, arguing that their fears of presumed prejudice remained.<sup>102</sup> The district court denied the motions, concluding that "any potential for prejudice was cured" "through the Court's methodical, active pursuit of a fair trial from voir dire ... to ... the

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<sup>99</sup> R126 at 14644-47.

<sup>100</sup> *Id.* at 14645-47.

<sup>101</sup> R126 at 14643-46.

<sup>102</sup> R12-1338 at 2-3; R12-1342 at 2-3; R12-1343 at 1-4; R12-1347 at 1-2.

return of verdict.”<sup>103</sup>

In November 2002, Guerrero renewed his motion for a new trial based on newly discovered evidence and in the interests of justice; the motion was adopted by Campa, Gonzalez, Hernandez, and Medina.<sup>104</sup> Guerrero argued that a new trial was warranted because of “misrepresentations of fact and law made by the United States Attorney in opposing the ... motion for change of venue” and that the government’s position regarding change of venue was contradicted by its position in a motion for change of venue which the government filed in *Ramirez v. Ashcroft*, No. 01-4835-Civ-Huck (S.D.Fla.) on 25 June 2002. In the *Ramirez* motion, the government argued that:

the Elian Gonzalez matter was an incident which highly aroused the passions of the community and resulted in numerous demonstrations

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5. While the Elian Gonzalez affair has received national attention[,] the exposure in Miami-Dade County has been continuous and pervasive. Indeed, even now, more than a year after the return of Elian to his father [in April 2000], there continues

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<sup>103</sup> *Id.* at 15.

<sup>104</sup> R15-1635, 1638, 1644, 1647, 1650, 1651. The National Jury Project, the National Lawyers Guild, the International Association of Democratic Lawyers sought and were granted leave to file briefs as *amicus curiae* in support of this motion. R15-1640, 1653, 1654, 1655, 1677.

to be extensive publicity ... which will arouse and inflame the passions of the Miami-Dade community.

...

8. Historically, media articles relating to Elian Gonzalez and the handling of his return to his father have persisted from November 1999 to the present [June 2002].<sup>105</sup>

The government, borrowing arguments advanced by the defendants in this case, declared that

[i]t cannot be disputed that the return of Elian Gonzalez to his father in Cuba created a serious rift in this community, a rift which continues to the present. This rift exists not only between Hispanics and non-Hispanics, but also between Cubans a[n]d non-Cubans and within the Cuban community itself. It is beyond dispute that virtually every person in Miami-Dade county [sic] has a strong opinion, one way or another, regarding the INS and the U.S. Attorney General's Office, and the manner in which the Elian Gonzalez matter was handled. The effect of the media coverage ... serves to foment and revive these feelings on an ongoing basis .... As such the media accounts cannot do anything other than create the general state of mind where the inhabitants of Miami-Dade County are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the instant case solely on the

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<sup>105</sup> R15-1636, Ex. 2 at 2-3, 11.

evidence presented in the courtroom .... Under such circumstances and strongly held emotions, and in light of the media coverage ..., it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County.<sup>106</sup>

The government requested "a change in the location/venue" "outside of Miami Dade County to ensure that the Defendant ... receive a fair and impartial trial on the merits of the case."<sup>107</sup> They noted that, "[w]hile not requested," the court also had the discretion to transfer the trial to another judicial district.<sup>108</sup> The government orally argued that there were no incidents "since 1985 that so polarized the community. That so affected every individual in the community as the Elian Gonzalez affair."<sup>109</sup> When the district court asked whether a transfer of the case to the Fort Lauderdale division courthouse would be sufficient, the government responded that "[t]he demonstrations occurred in Miami. They are predominantly conducted by citizens of Miami Dade county [sic]. As you move the case out of Miami Dade you have less likelihood there are going to be deep-

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<sup>106</sup> *Id.* at 14-15.

<sup>107</sup> *Id.* at 17, 16.

<sup>108</sup> *Id.* at 16 n. 1.

<sup>109</sup> R15-1636, Ex. 3 at 24. I note that the Elian Gonzalez matters occurred between the 1998 indictment of the defendants in this case and the beginning of their trial in 2000. The first anniversary protests of Elian Gonzalez's return to Cuba occurred during these defendants' trial.

seated feelings and deep-seated prejudices in the case.”<sup>110</sup>

In support of the interests of justice argument, the defendants included an affidavit by Professor Moran, news articles, reports by Human Rights Watch regarding threats to the freedom of expression within the Miami Cuban exile community, a public opinion survey conducted by legal psychologist Dr. Kendra Brennan, and a study by Florida International University’s Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez.<sup>111</sup>

The district court denied the motion, improperly finding that the government’s position in *Ramirez* was not newly discovered evidence and that it lacked jurisdiction to consider the interests of justice argument. It did not, therefore, consider any of the exhibits attached to the motion.<sup>112</sup>

## II. DISCUSSION

### A. *Denial of Motion for Change of Venue*

This case presents the opportunity to clarify circuit law to conform with Supreme Court precedent. The district court misfocused its inquiry under Federal Rule of Criminal Procedure 21(a).

Our review of the denial of a motion for change of venue is multi-level. We review the district court’s interpretation of the Federal Rules of Criminal

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<sup>110</sup> *Id.* at 25.

<sup>111</sup> R15-1636, Exs. 4, 5, 7-10, 12.

<sup>112</sup> R15-1678 at 5, 6 n.3, 8.



Procedure *de novo*<sup>113</sup> and its application of Rule 21(a) for an abuse of discretion.<sup>114</sup> Under an abuse of discretion standard, we will not disturb a decision which was made within the “range of possible conclusions” available to the district court, was not an error of judgment, or was not the misapplication of law.<sup>115</sup> A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.<sup>116</sup> “When a criminal defendant alleges that pretrial publicity precluded a trial consistent with the standards of due process, it is the duty of a reviewing court to undertake an independent evaluation of the facts established in support of such an allegation.”<sup>117</sup>

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<sup>113</sup> See *United States v. Noel*, 231 F.3d 833, 836 (11th Cir.2000) (per curiam).

<sup>114</sup> See *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir.1975). In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to 1 October 1981.

<sup>115</sup> *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir.2004) (en banc) (internal citation omitted).

<sup>116</sup> *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir.2005) (per curiam).

<sup>117</sup> *Williams*, 523 F.2d at 1208; *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) (“Appellate tribunals have the duty to make an independent evaluation of the circumstances.”).

A district court's consideration of a federal criminal defendant's motion for change of venue is guided by Rule 21(a), which directs that the court must transfer the proceedings "if the court is satisfied that so great a prejudice against the defendant exists ... that the defendant cannot obtain a fair and impartial trial."<sup>118</sup> To show *presumed*, rather than *actual* prejudice, the defendant must show that "outside influences affecting the community's climate of opinion as to a defendant are inherently suspect" and that "the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue."<sup>119</sup> In reviewing whether the outside influences operated to deprive the defendants of a fair trial, we may "widen our breadth of consideration" and may consider the combined effect of various factors.<sup>120</sup> Courts, therefore, look at not only the pretrial publicity, but will also consider "inherent community prejudice,"<sup>121</sup> the government's

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<sup>118</sup> Fed.R.Crim.P. 21(a).

<sup>119</sup> *Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir.1966); *See also Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522 ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.")

<sup>120</sup> *Williams*, 523 F.2d at 1209.

<sup>121</sup> *Jordan v. Lippman*, 763 F.2d 1265, 1266, 1267, 1269, 1279 (11th Cir.1985) (finding that, in a state habeas corpus proceeding, a new trial based on a change of venue was required when "extensive publicity" was coupled with the community's "long history of racial turbulence" and the involved institution's "economic and social impact" on community).

closing argument,<sup>122</sup> an “inflamed community atmosphere,”<sup>123</sup> the connection between the community prejudice and the trials,<sup>124</sup> the interplay between the crime and the economic life of the community,<sup>125</sup> and a familiarity with unpopular or ill-reputed groups with whom the defendant was associated.<sup>126</sup> In cases alleging pervasive community prejudice, publicity or intense media coverage evidence is not the focus; it is one form of evidence proffered to show the prejudice within the

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<sup>122</sup> *Williams*, 523 F.2d at 1209.

<sup>123</sup> *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir.1985).

<sup>124</sup> *Meeks v. Moore*, 216 F.3d 951, 967 (11th Cir.2000).

<sup>125</sup> *United States v. Farries*, 459 F.2d 1057, 1061 (3rd Cir.1972).

<sup>126</sup> *United States v. Angiulo*, 897 F.2d 1169, 1181-82 (1st Cir.1990). Other courts have considered how the charged crime reinforced “deeply-rooted passions” and “deeply-held prejudice” within the community, *United States v. Holder*, 399 F. Supp. 220, 227-28 (D.S.D.1975), how the charged crimes related to the community reputation, *United States v. Wheaton*, 463 F. Supp. 1073, 1078 (S.D.N.Y.1979), the defendants’ state citizenship and community racial bias, *United States v. Washington*, 813 F. Supp. 269, 274, 275 (D.Vt.1993), “extreme community hostility,” the defendant’s prominence in the community, the victim’s position as a public servant, and the defendant’s position as a community “outsider.” *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939, 963 (1988).

community.<sup>127</sup> “[P]ervasive [community] prejudice may not be presumed simply from the context of [news] articles alone” but must be supported by evidence of the influence of that publicity.<sup>128</sup>

We review the “special facts” of each case alleging prejudicial publicity<sup>129</sup> and the totality of the circumstances of cases alleging presumed prejudice.<sup>130</sup> The totality of the circumstances includes all of the circumstances and events occurring before and during the trial and their cumulative effect,<sup>131</sup> including an extensive *voir dire*.<sup>132</sup> Where the community sentiment is strong, courts should place “emphasis on the feeling in the community rather than the transcript of *voir dire*,” which may not “reveal the shades of prejudice that may influence a verdict.”<sup>133</sup> A court does not undertake a totality of the circumstances’ review by confining itself to community publicity which relates only to the guilt or innocence of the defendant. It may, therefore, consider the effect of the publicity

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<sup>127</sup> *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir.1979).

<sup>128</sup> *Mayola v. Alabama*, 623 F.2d 992, 999 (5th Cir.1980).

<sup>129</sup> *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) (per curiam).

<sup>130</sup> See *Murphy v. Florida*, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975).

<sup>131</sup> See *Williams*, 523 F.2d at 1206 n. 7.

<sup>132</sup> See *Patton v. Yount*, 467 U.S. 1025, 1029, 1034, 104 S.Ct. 2885, 2888, 2890, 81 L.Ed.2d 847 (1984).

<sup>133</sup> *Pamplin*, 364 F.2d at 7.

and the timing of the trial during a hotly contested election involving the prosecutor and judge,<sup>134</sup> publicity during a Presidential election in which a similar crime was a subject of debate,<sup>135</sup> the extent of the dissemination of the publicity,<sup>136</sup> the character of that publicity,<sup>137</sup> the proximity in time of the publicity to the trial,<sup>138</sup> the familiarity of the jury with the charged crime,<sup>139</sup> and the setting and kind of community in which the coverage and trial took place.<sup>140</sup> I recognize that publicity which is unrelated

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<sup>134</sup> *Sheppard*, 384 U.S. at 352, 354, 86 S.Ct. at 1517-18.

<sup>135</sup> *Mu'Min v. Virginia*, 500 U.S. 415, 429, 111 S.Ct. 1899, 1907, 114 L.Ed.2d 493 (1991).

<sup>136</sup> *Williams*, 523 F.2d at 1209.

<sup>137</sup> *Id.* at 1209; *Murphy*, 421 U.S. at 802, 95 S.Ct. at 2037.

<sup>138</sup> *Murphy*, 421 U.S. at 802, 95 S.Ct. at 2037; *Williams*, 523 F.2d at 1210.

<sup>139</sup> *Murphy*, 421 U.S. at 800, 95 S.Ct. at 2036; *Williams*, 523 F.2d at 1210. As the *en banc* opinion correctly notes, the defendants used only 15 of their 18 challenges to the jury pool to excuse jurors whose answers revealed their potential bias against them. Although a defendant's failure to use all available preemptory challenges may indicate a lack of juror prejudice, *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985), such a fact is merely one factor to be considered in the totality of the circumstances determination. *United States v. Gorel*, 622 F.2d 100, 103-04 (5th Cir.1979); *Dobbert v. Florida*, 432 U.S. 282, 302-03, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977).

<sup>140</sup> See *Sheppard*, 384 U.S. at 354-55, 86 S.Ct. at 1518; *Mu'Min*, 500 U.S. at 429, 111 S.Ct. at 1907.

to the defendant or to the matters at trial may not have the evidentiary weight necessary to establish prejudicial pretrial publicity, but also note that publicity that does not “directly relate” to the defendant or the charge offense may be significant to the trial.<sup>141</sup>

In this case, however, the district court focused solely on the prejudicial publicity prong of the analysis.<sup>142</sup> *It made no findings regarding the prejudice within the community.* In denying a change of venue, the district court ignored its own recognition of the substantial likelihood of prejudice as a result of witnesses’ press events and the unsequestered jury’s exposure,<sup>143</sup> the community

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<sup>141</sup> *Jordan*, 763 F.2d at 1279 (“[E]ven to the extent that the publicity did not directly relate to the [defendant’s] case, it would be naive to underestimate its significance in the context of the trial .... [W]e cannot blind ourselves to the significant [prejudicial] overtones in the news media coverage” of community events.).

<sup>142</sup> *Hernandez*, 106 F. Supp. 2d at 1319, 1321 n. 2, 1322. Further, there is no indication that the district court considered the community and the events ongoing in the community within a totality of the circumstances analysis in either the rulings on the a change of venue or the motions for a new trial.

<sup>143</sup> R7-978 at 9 n. 5 (“Articles about this case have appeared daily in the *Miami Herald* and *El Nuevo Herald* [,] weekly in the national and international press [and that] local televised news programs, particularly those affiliated with the Spanish-speaking channels, have featured coverage of the trial since it began.”); *Id.* at 15, 17 (finding “significant” “local and national media coverage”



events and memorials honoring the victims of the shootdown, and the fear created in the minds of the jurors from the evidence of spies and weapons in their neighborhoods, and the history of violence practiced by some members of the Cuban-exile community.

Despite the district court's numerous efforts to ensure an impartial jury in this case, I am not convinced that empaneling such a jury in this community was possible because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami. Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue-some of which focused on the defendants in this case and the government for whom they worked but others which focused on relationships between the United States and Cuba-flooded Miami both before and during this trial.<sup>144</sup> The trial required consideration of the BTTR shootdown and the martyrdom of those persons on the flights. During the trial, there were both "commemorative flights" and public ceremonies to mark the anniversary of the shootdown. Moreover,

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since the indictment that had "only intensified as the trial has progressed"... and that "[s]ince the trial began, this case has been the daily bread for the local press and media").

<sup>144</sup> Without determining the validity of Professor Moran's poll, I note that the district court approved the expenditures related to the poll, including the size of the statistical sample.

the Elian Gonzalez matter, which was ongoing at the time of the change of venue motion, concerned these relationships between the United States and Cuba and necessarily raised the community's awareness of the intense and emotional concerns of the Cuban exile community. It is uncontested that the publicity concerning Elian Gonzalez continued during the trial, "arous [ing] and inflam[ing]" passions within the Miami-Dade community.<sup>145</sup> Despite the district court's thorough and extensive *voir dire* and its many efforts aimed at protecting the jurors' privacy, *voir dire* highlighted the community's awareness of this case and also that of Elian Gonzalez. The district court's gag order failed to restrain the widespread publicity of the shutdown anniversary memorials and demonstrations. The jurors continued to be concerned about their exposure to the press into their deliberations. With the emotional intensity of the events in the community and the publicity of those events, which relate both directly and indirectly to these defendants, the "jurors may well have been affected even if they were attempting to follow the court's instructions."<sup>146</sup> In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or *voir dire*; thus, a change of venue was mandated. The evidence at trial validated the media's publicity regarding the "Spies Among Us" by disclosing the clandestine activities of not only the defendants but also of the various Cuban exile groups and their paramilitary camps that continue to

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<sup>145</sup> R15-1636, Exh. 2 at 2-3.

<sup>146</sup> *Jordan*, 763 F.2d at 1279.

operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable. Further, the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions. "[I]t would be blinking reality not to recognize the extreme prejudice inherent" in this unique circumstance.<sup>147</sup>

### *B. Denial of New Trial*

A district court is authorized to grant a new trial on the basis of newly discovered evidence if a motion for new trial is filed within three years of the verdict.<sup>148</sup> The newly discovered evidence must satisfy a five-part test: (1) the evidence was newly discovered after the trial; (2) the movant shows due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court; and (5) the evidence is of such a nature that a new trial would reasonably produce a new result.<sup>149</sup> Newly discovered evidence is not limited to just the question of the defendant's innocence but can include other issues of

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<sup>147</sup> *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424 (1965).

<sup>148</sup> See Fed.R.Crim.P. 33(a) and (b)(1).

<sup>149</sup> See *United States v. DiBernardo*, 880 F.2d 1216, 1224 (11th Cir.1989).

law,<sup>150</sup> including questions of the fairness of the trial.<sup>151</sup>

The government's motion in *Ramirez* meets these criteria. Although the facts in *Ramirez* differ from the facts in this case, there are remarkable similarities, including the plaintiff's [or, in this case, the government's witnesses] exploitation of the media's coverage of the evidence and the issues at trial. In *Ramirez*, a civil employment discrimination case, the government was defending the INS against a Hispanic plaintiff. More significant, however, is that the underlying facts for the government's motion in *Ramirez* regarding the pervasive community prejudice were based on publicity and events that occurred before and during the trial of this case, "November 1999 to the present [June 2002],"<sup>152</sup> and which were much closer in temporal proximity. The newly discovered evidence, therefore, was not the facts on which the government's *Ramirez* motion was based but was the government's position on the events which were occurring during the trial of these defendants and its legal position as to the applicability of *Pamplin*.<sup>153</sup>

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<sup>150</sup> See *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir.1978) (per curiam).

<sup>151</sup> See *United States v. Williams*, 613 F.2d 573, 575 (5th Cir.1980).

<sup>152</sup> R15-1636, Exh. 2 at 1-2

<sup>153</sup> In response to the defendants' motion for a change of venue in this case, the government had argued that *Pamplin* did not apply where the alleged

Attorneys representing the United States are burdened both with an obligation to zealously represent the government and, as a "representative of a government dedicated to fairness and equal justice to all," an "overriding obligation of fairness" to defendants.<sup>154</sup> That obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction."<sup>155</sup> A trial may be rendered fundamentally unfair by the prosecution's use of factually contradictory theories.<sup>156</sup> A prosecutor's

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prejudice was the "community's internal attitudes" as opposed to an outside influence. R3-443 at 6.

<sup>154</sup> *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir.1998).

<sup>155</sup> *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir.1994) (internal citation omitted).

<sup>156</sup> *See Smith v. Goose*, 205 F.3d 1045, 1051-52 (8th Cir.2000) (holding that the prosecution's use of contradictory theories for different defendants in a murder trial violated due process). Our adversary system is "poorly served when a prosecutor, the state's own instrument of justice, stacks the decks in his favor." *Id.* at 1051.

I recognize that that judicial equitable estoppel generally bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, *related* proceeding. *See New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001). Judicial equitable estoppel, however, is not applicable here because *Ramirez*, a civil case, was unrelated to this criminal prosecution. However, because the doctrine seeks to prevent a "party from 'playing fast and loose' " with the courts, the guidance that it provides may be helpful to parties considering a change in their subsequent position in unrelated litigation based upon the same set of facts. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H.

reliance on a legal position despite "knowing full well" that it is wrong is "reprehensible" in light of his duty "by virtue of his oath of office."<sup>157</sup> Further, when the government has sought to foreclose the submission of evidence, an evidentiary hearing is warranted on a motion for new trial when the newly discovered evidence "might likely lead" to a new trial.<sup>158</sup>

We do not know when the government changed its position regarding both the application of *Pamplin* and the pervasive community prejudice in Miami-Dade County because there was no evidentiary hearing. Because the government's timing on its change of position might lead to a new trial, an evidentiary hearing was warranted.

Here, a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the prosecutor's improper prosecutorial references and position regarding a change of venue. Moreover, the evidence at trial strongly suggested not only adverse economic consequences for jurors voting for acquittal, but the prospect of violence from an already impassioned and emotional community possessed of firearms and bombs. The district court's instructions to the jury only generally reminded the jury that

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Cooper, *Federal Practice and Procedure* § 4477 (2d ed.2002).

<sup>157</sup> *United States v. Masters*, 118 F.3d 1524, 1525 & n. 4 (11th Cir.1997) (per curiam).

<sup>158</sup> *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir.1990) (per curiam).



statements by the attorneys were not evidence to be considered. The community's displeasure with the Elian Gonzalez controversy paled in comparison with its revulsion toward the BTTR shutdown. In a civil case which arose out of the same facts as this criminal prosecution, the BTTR shutdown was described as an "outrageous contempt for international law and basic human rights" perpetrated by the Cuban government in murdering "four human beings" who were "Brothers to the Rescue pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys."<sup>159</sup> In *Ramirez*, the government not only recognized the effect of the Elian Gonzalez matter on the community but also argued that the publicity continued through 2002. If the effect of those inflamed passions is clear in an employment discrimination action against the agency that contributed to Elian Gonzalez's removal and that failed to support the Cuban exiles' position, it is manifest in a criminal case against admitted Cuban spies who were alleged to have contributed to the murder of "humanitarians" working to rescue rafters such as Elian Gonzalez.

### III. CONCLUSION

In light of the foregoing discussion, I can only conclude that the defendants' convictions should be reversed and the case should be remanded for a new trial.

I am aware that, for many of the same reasons

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<sup>159</sup> *Alejandro*, 996 F. Supp. at 1242.

discussed above, the reversal of these convictions would be unpopular and even offensive to many citizens. However, I am equally mindful that those same citizens cherish and support the freedoms they enjoy in this country that are unavailable to residents of Cuba. One of our most sacred freedoms is the right to be tried fairly in a noncoercive atmosphere and thus be afforded a fair trial. In the final analysis, we are a nation of laws in which every defendant, no matter how unpopular, must be treated fairly-a concept many consider alien to the current Cuban regime. Our Constitution requires no less.

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Nos. 01-17176, 03-11087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY,  
A.K.A. CAMILO, A.K.A. OSCAR, RENE GONZALEZ, A.K.A.  
ISELIN, A.K.A. MANUEL VIRAMONTEZ, A.K.A. JOHN DOE  
1, A.K.A. MANUEL VIRAMONTES, LUIS MEDINA, A.K.A.  
OSO, A.K.A. JOHNNY, A.K.A. ALLAN, A.K.A. JOHN DOE 2,  
ANTONIO GUERRERO, A.K.A. ROLANDO GONZALEZ-DIAZ,  
A.K.A. LORIENT, DEFENDANTS-APPELLANTS.

UNITED STATES OF AMERICA, PLAINTIFF APPELLEE,

*v.*

GERARDO HERNANDEZ, A.K.A. GIRO, A.K.A. MANUEL  
VIRAMONTEZ, A.K.A. JOHN DOE 1, A.K.A. MANUEL  
VIRAMONTES, LUIS MEDINA, A.K.A. OSO, A.K.A. JOHNNY,  
A.K.A. ALLAN, A.K.A. JOHN DOE 2, ANTONIO GUERRERO,  
A.K.A. ROLANDO GONZALEZ-DIAZ, A.K.A. LORIENT,  
RUBEN CAMPA, A.K.A. JOHN DOE 3, A.K.A. VICKY, A.K.A.  
CAMILO, A.K.A. OSCAR, , DEFENDANTS-APPELLANTS.

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[Decided: Aug. 9, 2005]

Filed: Aug. 9, 2005]

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Before: BIRCH, KRAVITCH, and OAKES\*, Circuit Judges.

## OPINION

### PER CURIAM:

The defendant-appellants, Ruben Campa, Rene Gonzalez, Gerardo Hernandez, Luis Medina and Antonio Guerrero, were convicted and sentenced for various offenses charging each of them with acting as unregistered Cuban intelligence agents working within the United States. Hernandez was also convicted of conspiracy to commit murder by supporting and implementing a plan to shoot down United States civilian aircraft outside of Cuban and United States airspace. They appeal their convictions, sentences, and the denial of their motion for new trial arguing, *inter alia*, that the pervasive community prejudice against Fidel Castro and the Cuban government and its agents and the publicity surrounding the trial and other community events combined to create a situation where they were unable to obtain a fair and impartial trial.<sup>1</sup> We agree,

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\* Honorable James L. Oakes, United States Circuit Judge for the Second Circuit, sitting by designation.

<sup>1</sup> The defendants raise numerous other issues unrelated to the change of venue. Campa, Gonzalez,

and REVERSE their convictions and REMAND for a retrial.

Our consideration of a motion for change of venue requires a review of the totality of the circumstances surrounding the trial. Therefore, in Part I, we consider the Background: the indictments, the motions for change of venue, voir dire, the court's interactions with the media, general facts regarding the trial, the evidence presented at trial, jury conduct and concerns during the trial, and the motions for new trial. Our review of the evidence at trial is more extensive than is typical for consideration of an

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Guerrero, Hernandez, and Medina argue prosecutorial misconduct regarding the misconduct of a government witness and during closing argument, improper use of the Classified Information Procedures Act, improper denial of a motion to suppress fruits of searches under the Foreign Intelligence Surveillance Act, *Batson* violations, insufficiency of the evidence regarding the conspiracy to transmit national defense information to Cuba, improper denial of a jury instruction regarding specific intent, and sentencing errors. Campa, Gonzalez, and Medina contend that the evidence was insufficient on the counts relating to violations of the Foreign Services Registration Act. Campa and Guerrero maintain that the district court improperly denied their jury instruction on necessity and justification. Hernandez raises the denial of a motion to dismiss Count III based on Foreign Sovereign Immunities Act jurisdictional grounds and insufficiency of the evidence for conspiracy to commit murder. Because we reverse their convictions based on the denial of their motions relating to change of venue, we do not address these additional issues.

appeal involving the denial of a motion for change of venue. This is so because the trial evidence itself created safety concerns for the jury which implicate venue considerations. In Part II, we discuss the law and our application of the law to the facts in this case. In Part III, we present our conclusion.

## **I. BACKGROUND**

### *A. The Indictments*

Campa, Gonzalez, Guerrero, Hernandez, and Medina were arrested on a criminal complaint on 12 September 1998, and were subsequently indicted with nine codefendants for conspiring to act as agents of the Republic of Cuba without registering with the Attorney General of the United States and to defraud the United States, in violation of 18 U.S.C. § 951(a)<sup>2</sup>

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<sup>2</sup> Section 951 states:

(a) Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.

(b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.

18 U.S.C. § 951(a) and (b).

In 28 C.F.R. § 73.1, the Attorney General set forth definitions for the terms used in the statute:

(a) The term agent means all individuals acting as representatives of, or on behalf of, a foreign government or official, who are subject to the direction or control of that foreign government or official, and who are not specifically excluded by the terms of the Act or the regulations thereunder.

(b) The term foreign government includes any person or group of persons exercising sovereign de facto or de jure political



jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been regarded by the United States as a governing authority.

(c) The term prior notification means the notification letter, telex, or facsimile must be received by the addressee named in § 73.3 prior to commencing the services contemplated by the parties.

28 C.F.R. § 73.1(a)-(c).

Foreign agents are to provide notification to the Attorney General as follows:

(a) Notification shall be made by the agent in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of the Registration Unit of the Criminal Division, except for those agents described in paragraph (b) ... of this section. The document shall state that it is a notification under 18 U.S.C. § 951, and provide the name or names of the agent making the notification, the firm name, if any, and the business address or addresses of the agent, the identity of the foreign government or official for whom the agent is acting, and a brief description of the activities to be conducted for the foreign government or official and the anticipated duration of the activities. Each notification shall contain a certification, pursuant to 28 U.S.C. § 1746, that the notification is true and correct.

(b) Notification by agents engaged in law enforcement investigations or regulatory agency activity shall be in the form of a letter, telex, or facsimile addressed to the Attorney General, directed to the attention of Interpol-United States National Central Bureau. Notification by agents engaged in intelligence, counterintelligence, espionage, counter-espionage or counterterrorism assignment or service shall be in the form of a letter, telex, or facsimile addressed to the Attorney General,

and 28 C.F.R. § 73.1et seq., and numerous overt acts, in violation of 18 U.S.C. § 371 (Count 1). They were alleged to have "function[ed] as covert spies ... by gathering and transmitting information to Cuba[ ] concerning United States military installations, government functions, and private political activity; by infiltrating, informing on and manipulating anti-Castro political groups in Miami-Dade County [Florida]; by sowing disinformation" within these

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directed to the attention of the nearest FBI Legal Attache. In case of exceptional circumstances, notification shall be provided contemporaneously or as soon as reasonably possible by the agent or the agent's supervisor. The letter, telex, or facsimile shall include the information set forth in paragraph (a) of this section.

...

(d) Any subsequent change in the information required by paragraph (a) of this section shall require a notification within 10 days of the change.

(e) Notification under 18 U.S.C. § 951 shall be effective only if it has been done in compliance with this section, or if the agent has filed a registration under the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611, et seq., which provides the information required by paragraphs (a) and (d) of this section.

28 C.F.R. § 73.3(a), (b), (d), (e).

Under 18 U.S.C. § 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

groups and in dealings with other private and public groups within the United States, "and by carrying out other operational directives of the Cuban government."<sup>3</sup> Guerrero, Hernandez, and Medina were also charged with conspiring to deliver to Cuba information "relating to the national defense of the United States,"<sup>4</sup> in violation of 18 U.S.C. §§ 794(a), (c), and 2 (Count 2).<sup>5</sup> Gonzalez was charged with

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<sup>3</sup> R1-224 at 3-4.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* 18 U.S.C. § 794(a) provides that:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power (as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

18 U.S.C. § 794(c) states:

acting as an agent of the Republic of Cuba without prior notification to the Attorney General, and Hernandez and "John Doe 4 a/k/a Albert Manuel Ruiz" were charged with causing Gonzalez to act as an unregistered agent, in violation of 18 U.S.C. §§ 951 and 2 (Count 15).<sup>6</sup> Guerrero was charged with acting as an agent of the Republic of Cuba without notification to the Attorney General, and Hernandez, Medina, and Campa were charged with causing Guerrero to act as an unregistered agent, in violation of 18 U.S.C. §§ 951 and 2 (Count 16).

Hernandez was charged with conspiracy to murder, in violation of 18 U.S.C. §§ 1111 and 2, and overt acts related to that conspiracy, in violation of 18 U.S.C. §§ 1117 and 2 (Count 3),<sup>7</sup> possession of a

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If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

Under 18 U.S.C. § 2.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

<sup>6</sup> *Id.* at 23.

<sup>7</sup> 18 U.S.C. § 1111 states:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and

counterfeit passport, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 4),<sup>8</sup> possession of five or more

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premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

Conspiracy to murder is addressed in 18 U.S.C. § 1117:

If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

<sup>8</sup> Fraud and misuse of passports and visas is governed by 18 U.S.C. § 1546:

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have

been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact-

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10



fraudulent identification documents, in violation of 18 U.S.C. §§ 1028(a)(3) and 2 (Count 5), possession of a fraudulent identification document, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 6), acting as a foreign agent for the Republic of Cuba without notification to the Attorney General (Count 13), and having caused Juan Pablo Roque (Count 19), Alejandro Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) to have acted as unregistered foreign agents, in violation of 18 U.S.C. §§ 951 and 2.

Campa was charged with possession of a counterfeit passport, in violation of 18 U.S.C. §§ 1546(a) and 2 (Count 7), possession of false identification documents, in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), and (c)(3), and 2 (Count 8)<sup>9</sup>, and acting as an agent of the Republic of Cuba without

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years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

<sup>9</sup> 18 U.S.C. § 1028(a)(3) provides:

Whoever, in a circumstance described in subsection (c) of this section-

....

(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents

....

shall be punished as provided in subsection (b) of this section.

prior notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 (Count 17).

Medina was charged with possession of a counterfeit passport (Count 9) and possession of a passport obtained by use of a false statement (Count 11), in violation of 18 U.S.C. §§ 1546(a) and 2, making a false statement on his passport application, in violation of 18 U.S.C. §§ 1542 and 2 (Count 10), possession of fraudulent identification documents, in violation of 18 U.S.C. §§ 1028(a)(3), (b)(2)(B), and (c)(3), and 2 (Count 12), acting as an agent of the Republic of Cuba without notification to the Attorney General, in violation of 18 U.S.C. §§ 951 and 2 (Count 14), and having caused Joseph Santos (Count 25) and Amarylis Silverio Santos (Count 26) to have acted as unregistered agents.<sup>10</sup> A gag order was subsequently entered governing the parties and their attorneys.<sup>11</sup>

### *B. Change of Venue*

In August 1999, Medina's attorney moved to incur expenses under the Criminal Justice Act to poll

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<sup>10</sup> FN10. Codefendants Albert Manuel Ruiz (Count 18), Juan Pablo Roque (Count 19), John Doe No. 5 a/k/a Ricardo Villareal (Count 20), John Doe No. 6 a/k/a Remijio Luna (Count 21), Alejandro Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) were also charged with having acted as unregistered agents, in violation of 18 U.S.C. §§ 951 and 2. Ruiz was also charged with causing Alonso (Count 22), Nilo Hernandez (Count 23), and Linda Hernandez (Count 24) to act as unregistered agents, in violation §§ 951 and 2. Roque remains unapprehended.

<sup>11</sup> R7-978 at 3; R21 at 117.

the Miami-Dade County community to determine whether it was a fair and unbiased venue for the trial.<sup>12</sup> Medina explained that the traditional methodology for addressing pretrial publicity was not appropriate and proposed that Florida International University Psychology Professor Gary Patrick Moran conduct a telephone poll with a "sample of 300 people."<sup>13</sup> The district court granted the motion.<sup>14</sup>

In January 2000, Campa, Gonzalez, Guerrero, and Medina moved for a change of venue, arguing that they were unable to obtain an impartial trial in Miami as a result of pervasive prejudice against anyone associated with Castro's Cuban government.<sup>15</sup> The motions for change of venue were based on pretrial publicity and "virulent anti-Castro sentiment" which had existed in Miami as "a

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<sup>12</sup> R1-280 at 2; R18 at 11-12.

<sup>13</sup> R1-280 at 3.

<sup>14</sup> R2-303.

<sup>15</sup> R2-317 (Guerrero), 321 (Medina), 324 (Gonzalez), 329 (Campa); R3-397 (Campa). Medina requested a change of venue "in light of evidence of pervasive community prejudice against the accused" as documented by Professor Gary Moran's survey which showed "public sentiment against persons alleged to be agents of Fidel Castro's Communist government in Cuba." R2-321 at 1-2. Moran concluded that, while there had been "several bursts of newspaper articles ... and other media attention" surrounding the Cuban spies' arrests, the basis for the motion was the "[v]irulent anti-Castro sentiment" in the community. *Id.* at 3.

dominant value ... for four decades.”<sup>16</sup> The motions were supported by news articles and Moran’s poll to substantiate “an atmosphere of great hostility towards any person associated with the Castro regime” and “the extent and fervor of the local sentiment against the Castro government and its suspected allies.”<sup>17</sup>

Although Campa, Gonzalez, Guerrero, and Medina had originally argued that the case should be moved to another judicial district, during oral argument on the motions, they agreed that they would be satisfied with a transfer of the case within the district from the Miami division to the Fort Lauderdale division. R5-586 at 2 n. 1.

The evidence submitted in support of the motions for change of venue was massive.<sup>18</sup> In 2000, a

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<sup>16</sup> R2-321 at 3; R2-316 at 2; R2-317 at 2; R2-324 at 1; R2-329 at 1; R2-334 (containing news articles which detail the history of anti-Castro sentiment in Miami); R3-397 at 1; R3-453 at 1-2; R3-455 at 2; R3-461 at 2-3.

<sup>17</sup> R2-329 at 1, 3; R2-334; R3-397; R3-455.

<sup>18</sup> The following articles specifically addressing the conspiracy and the indicted defendants were attached as exhibits in support of the motions for change of venue: George Gedda, *Federal officials say 10 arrested, accused of spying for Cuba*, MIAMI HERALD, Sept. 14, 1998, R2-334, Ex.; Manny Garcia, Cynthia Corzo, Ivonne Perez, *Spies among us: Suspects attempted to blend in, Miami*, MIAMI HERALD, Sept. 15, 1998, at A1, R2-334; David Lyons, Carol Rosenberg, *Spies among us: U.S. cracks alleged Cuban ring, arrests 10*, MIAMI HERALD, Sept. 15, 1998, at A1, R2-329, Ex. A; R2-334, Ex.; *Spies among us*, MIAMI HERALD, Sept. 15, 1998, at 14A, R2-329, Ex. F; Fabiola Santiago, *Big news saddens, angers exile community*,

MIAMI HERALD , Sept. 15, 1998, R2-334, Ex.; Juan O. Tamayo, *Arrest of spy suspects may be switch in tactics*, MIAMI HERALD, Sept. 15, 1998, R2-334, Ex.; Javier Lyonnet, Olance Nogueras, *Cae red de espionaje de Cuba / FBI viró al revés casa de supuesto cabecilla* and Pablo Alfons, Rui Ferreira, *Cae red de espionaje de Cuba / Arrestan a 10 en Miami*, NUEVO HERALD, Sept. 15, 1998, at A1, R2-329, Ex. B; *La Habana Contra El Pentagono* ("Havana versus the Pentagon")/*Estructura de la Red de Espionaje*, NUEVO HERALD, Sept. 15, 1998, R2-329, Ex. C; *Arrest of alleged Cuban spies demands vigorous prosecution*, SUN-SENTINEL, Sept. 16, 1998, at 30A, R2-329, Ex. G; Juan O. Tamayo, *Miscues blamed on military's takeover of Cuban spy agency*, MIAMI HERALD, Sept. 17, 1998, at 13A, R2-334, Ex.; David Kidwell, *Motion could delay trials of alleged 10 Cuban spies*, MIAMI HERALD, Oct. 6, 1998, at B1, R2-334, Ex.; David Lyons, *Cuban couple pleads guilty in spying case*, MIAMI HERALD, Oct. 8, 1998, at A1, R2-334, Ex.; David Kidwell, *Three more accused spies agree to plead guilty*, MIAMI HERALD, Oct. 9, 1998, at 4B, R2-329, Ex. H; R2-334, Ex.; Carol Rosenberg, *Couple admits role in Cuban spy ring*, MIAMI HERALD, Oct. 22, 1998, at 5B, R2-329, Ex. H; Juan O. Tamayo, *U.S.-Cuba spy agency contacts began a decade ago*, MIAMI HERALD, Oct. 31, 1998, R2-334, Ex.; David Kidwell, *U.S. tries to tie espionage case to planes' downing*, MIAMI HERALD, Nov. 13, 1998, at A1, R2-334, Ex.; Carol Rosenberg, *Identities of 3 alleged spies still unknown*, Nov. 14, 1998, at B1, R2-334, Ex.; Juan O. Tamayo, *Spies Among Us / Castro Agents Keep Eye on Exiles*, MIAMI HERALD, Apr. 11, 1999, R2-329, Ex. D; R2-334, Ex.; Carol Rosenberg, *Shadowing of Cubans a classic spy tale*, MIAMI HERALD , Apr. 16, 1999, at A1, R2-329, Ex. E; R2-334, Ex.; *Cuban spy indictment / Charges filed in downing of exile fliers / The Brothers to the Rescue Shootdown*: David Lyons, *Castro agent in Miami cited by U.S. grand jury*, Juan O. Tamayo, *Brothers to the Rescue Shootdown / Top spy planned Brothers ambush*, and Elaine de Valle, *Relatives: Charges fall short*, MIAMI HERALD , May 8, 1999, R2-334, Ex.; *Confessed Cuban spy receives seven years*, MIAMI HERALD, Jan. 29, 2000, at B1, R2-355 at C-2; *Contrite Cuban spy couple sentenced*, MIAMI HERALD, Feb. 3, 2000, at B5, R3-355 at D-2; *Miami*

prominent Cuban-American attorney in Miami explained that Cuban-related matters were “ ‘hot-button issues’ ” as there were over 700,000 Cuban-Americans living in Miami.<sup>19</sup> Of those Cuban-Americans, 500,000 remembered leaving their homeland, 10,000 had a relative murdered in Cuba, 50,000 had a relative tortured in Cuba, and thousands were former political prisoners.<sup>20</sup> Professor Moran’s survey results showed that 69 percent of all respondents and 74 percent of Hispanic respondents were prejudiced against persons charged with engaging in the activities named in the indictment.<sup>21</sup> A significant number, 57 percent of the Hispanic respondents and 39.6 percent of all respondents, indicated that, “[b]ecause of [their] feelings and opinions about Castro’s government,” they “would find it difficult to be a fair and impartial juror in a

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*Spy-Hunting*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. G-1; Carol Rosenberg, *Confessed Cuban spies sentenced to seven years*, MIAMI HERALD, Feb. 24, 2000, at 1B, R3-397, Ex. I-1; *Terrorism must not win in Brothers to the Rescue shoot-down*, MIAMI HERALD, Feb. 24, 2000, at 8B, R3-397, Ex. J-1 (“More than compensation, the families want the moral sting of a U.S. criminal prosecution in federal court. So far there is only one indictment: Gerardo Hernandez, alleged Cuban spy-ring leader, charged last year with conspiracy to murder in connection to the shoot down.”); *Brothers Pilots Remembered* (photo), MIAMI HERALD, Feb. 25, 2000, at B1, R3-397, Ex. K-1; Merika Lynch, *Shot-down Brothers remembered*, MIAMI HERALD, Feb. 25, 2000, at 2B, R3-397, Ex. L-1.

<sup>19</sup> R15-1636, Ex. 9.

<sup>20</sup> *Id.*

<sup>21</sup> R2-321, Ex. A at 10.



trial of alleged Cuban spies."<sup>22</sup> Over one-third of the respondents, 35.6 percent, said that they would be worried about criticism by the community if they served on a jury that reached a not-guilty verdict in a Cuban spy case.<sup>23</sup> The respondents who indicated an inability to be a fair and impartial juror were also asked whether there were any circumstances that would change their opinion.<sup>24</sup> Of those respondents, 91.4 percent of the Hispanic respondents and 84.1 percent of all respondents answered "no."<sup>25</sup> Many of the articles submitted by the defendants also documented the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, including the Elian Gonzalez matter.<sup>26</sup>

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<sup>22</sup> *Id.* at Ex. A at 12; *see Id.* at Ex. E at 3.

<sup>23</sup> *Id.* at Ex. A at 11-12.

<sup>24</sup> *Id.* at Ex. A at 13; *Id.* at Ex. E at 3.

<sup>25</sup> *Id.* at Ex. A at 13.

<sup>26</sup> R3-397, Exs.; R4-483, Exs.; R4-498, Exs.

During the same period of time in which the motions for change of venue were pending, and ultimately the trial was conducted, there was a substantial amount of publicity regarding other matters of interest in the Cuban community including the conditions in Cuba and high profile legal events occurring in Miami: the Elian Gonzalez matter; the arrest of an United States immigration agent, Mariano Faget, who was accused of spying for Cuba; and a city-county ban on doing business with Cuba.

As to the general anti-Castro sentiments and the conditions in Cuba: Juan O. Tamayo, *Former U.S. Pows Detail Torture by Cubans in Vietnam / Savage beatings bent captives to will of man dubbed "Fidel"*, MIAMI HERALD, Aug. 22, 1999, at

A1, R2-329, Ex. I; Juan O. Tamayo, *Cuba toughens crackdown/ "Biggest wave of repression so far this year"*, MIAMI HERALD, Nov. 11, 1999, at A1, R2-329, Ex. K; Juan O. Tamayo, *Witnesses link Castro, drugs*, MIAMI HERALD, Jan. 4, 2000, at B3, R2-329, Ex. J; Marika Lynch, *Castro-challenging pilot is offered parade, honors*, Jan. 4, 2000, at B1, R2-329, Ex. M; Jim Morin, *Cuba: I cannot speak my mind* (cartoon), MIAMI HERALD, Jan. 20, 2000, R2-329, Ex. P.

As to Elian Gonzalez: Juan O. Tamayo, *Castro Ultimatum/Return boy in 72 hours or migration talks at risk*, MIAMI HERALD, Dec. 6, 1999, at 1A, R2-329, Ex. N; Sara Olkon, Gail Epstein Nieves, Martin Merzer, *The Saga of Elian Gonzalez/Protest and Passion Spread to the Streets/Sit-ins block intersections and disrupt Dade traffic and Politicians, lawyers work to halt 6-year-old's return*, MIAMI HERALD, Jan. 7, 2000, 1A, *I see no basis for reversing decision, Reno says* and Sara Olkon, Anabelle de Gale, Marika Lynch, *Pained Cuban exiles disagree on what's best for Elian*, MIAMI HERALD, Jan. 7, 2000, at 17A, *U.S. Preparations for boy's return start slowly*, The Miami Herald, Jan. 7, 2000, at 18A, R2-329, Ex. O; *Peaceful Rally* (photo), MIAMI HERALD, Jan. 9, 2000, at 1A, R2-329, Ex. N; Jay Weaver, *3rd judge gets high profile in Elian case*, MIAMI HERALD, Feb. 23, 2000, at 1B, R3-397, Ex. A-1; Sandra Marquez Garcia, *Mary "appears" near Elian*, MIAMI HERALD, Mar. 26, 2000, at 1B, R4-483, Ex. E-3; Alfonso Chardy, *Authorities keep watch on exile groups*, MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. C-3; *Vigilant protestors*, MIAMI HERALD, Mar. 29, 2000, at 10A, R4-483, Ex. I-3; Andres Viglucci, Jay Weaver, and Frank Davies, *Dad gets visa, but no guarantees for Elian's transfer*, MIAMI HERALD, Apr. 5, 2000, at 1A, R4-483, Ex. D-3; Elaine de Valle, *Media watch events closely-and get watched in return/Hot words on radio scrutinized*, and Terry Jackson, *Media watch events closely-and get watched in return/TV talk, news shows flocking to South Florida*, MIAMI HERALD, Apr. 5, 2000 at 15A, R4-483, Ex. B-3; Karen Branch, *Crowds target Reno's home*, MIAMI HERALD, Apr. 6, 2000, at 2B, R4-483, Ex. A-3; *The saga of Elian/Reno wants Elian today/Boy must be at airport by 2 P.M./Defiant*

*family refusing to comply: Andres Viglucci, Jay Weaver, and Ana Acle, Great-uncle challenges U.S. to take boy "by force", and Carol Rosenberg, The Attorney general followed "instinct" as final mediator, MIAMI HERALD, Apr.13, 2000, at 1A, R4-483, Ex. F-3; The saga of Elian / Family defies order / Crowd swells at Little Havana home / Judge dismisses family's custody case / Panel will weigh request for a stay / U.S. takes no action to remove Elian: Ana Acle, In a show of solidarity, VIPs flock to visit boy, and Andres Viglucci and Jay Weaver, Reno: U.S. will explore all peaceful solutions, MIAMI HERALD, Apr. 14, 2000, at 1A, R4-483, Ex. G-3; Saga of Elian / Standoff over custody / A show of solidarity (photo), MIAMI HERALD, Apr, 14, 2000, at 20A, R4-483, Ex. H-3; Karl Ross, W. Dade home of attorney general on alert, and Police say an anonymous caller phoned in bomb threat April 13, MIAMI HERALD , Apr. 16, 2000, R4-498, Ex. A-4; Raid's Prelude: How talks failed / Missed signals helped doom deal and Sara Olkon, Diana Marrero, and Elaine de Valle, Thousands protest seizure / Separate rally backs Reno's actions, MIAMI HERALD , Apr. 30, 2000, at 1A, R4-498, Ex. C-4; Carol Rosenberg, INS agent targeted by death threats, MIAMI HERALD, May 6, 2000, R4-498, Ex. B-4; and In memory of mothers who died at sea (photo), MIAMI HERALD , R4-498, Ex. D-4;*

As to Mariano Faget: Elaine de Valle, Fabiola Santiago, and Marika Lynch, *FBI: Official in INS spied for Cuba*, MIAMI HERALD, Feb. 18, 2000, at A1, R3-397 at C-1; Amy Driscoll, Juan Tamayo, *Spy bait taken instantly / Alleged Cuban agent phoned contact after receiving false FBI information*, Fabiola Santiago, *Aloof suspect with high clearance was ideally positioned to do harm*, and *Tracking Faget* (photos), MIAMI HERALD, Feb. 19, 2000, at A1, R3-397 at B-1; Don Bohning, *Faget's father was a brutal Batista official*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. G-1; Frank Davies, *Cuba, U.S. still fight Cold War*, MIAMI HERALD, Feb. 19, 2000, at 21A, R3-397, Ex. H-1; Juan O. Tamayo, *Cuban diplomat expelled over spy link*, MIAMI HERALD, Feb. 20, 2000, at A1, R3-397, at D-1; Liz Balmaseda, *Spy case boosts worst suspicions*, MIAMI HERALD, Feb. 21, 2000, at B1, R3-397, at F-1; Juan O.

One of the articles, which addressed a bomb threat against the Attorney General of the United States following a collapse of talks in the Elian Gonzalez case, recited a history of anti-Castro exile group violence in the Miami-Dade community.

Scores of bomb threats and actual bombings have been attributed to anti-Castro exile groups dating back to the 1974 bombings of a Spanish-language publication, *Replica*. Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence.

In the early 1980s, the Mexican and Venezuelan

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Tamayo, *Cuban diplomat linked to Elian, INS spy case*, MIAMI HERALD, Feb. 22, 2000, at A1, R3-397, at E-1; Juan O. Tamayo, *More exiles maneuvering for business with Cuba*, MIAMI HERALD, Mar. 5, 2000, at A-1, R3-455 at A-2; Ana Radelat and Jan O. Tamayo, *FBI agents expel defiant Cuban envoy*, MIAMI HERALD, at A-1, R3-455 at B-2.

As to the business ban: Marika Lynch, Fernando Almanzar, *Protest, taping set to follow Van Van show*, MIAMI HERALD, Sept. 28, 1999, at 3B, and Tyler Bridges, Andres Viglucci, *Miami may bar Van Van next time/County's Penelas also opposed*, MIAMI HERALD, Oct. 13, 1999, at B1, R2-329, Ex. L; Don Finefrock, *Ban on business with Cuba tightened*, MIAMI HERALD, Feb. 25, 2000, at 2A, R3-397, Ex. M-1; Jordan Levin, *Miami-Dade threatens to cancel film fest grant/Cuban movie collides with county law*, MIAMI HERALD, Feb. 25, 2000, at 1A, R3-397, Ex. N-1; Jordan Levin, *Groups "warned" on Cuba resolution*, MIAMI HERALD, May 15, 2000, at 1B, R4-498, Ex. E-4; *Decenas De exiliados se congregaron ante la Corte Federal para reclamar el derecho de Elian Gonzalez a permanecer en EU*, R3-455, Ex. E-2.

consular offices were bombed in retaliation for their government's establishing relations with Cuba.

Since then, numerous small businesses—those promoting commerce, travel, or humanitarian aid to Cuba—have been targeted by bombers.<sup>27</sup>

The government responded that the Miami-Dade Hispanic population was a “heterogeneous,” “highly diverse, even contentious” “group” immune from the influences which would preclude a fair trial.<sup>28</sup> Following oral arguments on 26 June 2000, the district court denied the motion without prejudice, finding that the defendants had failed to demonstrate that a change of venue was necessary to provide them with a fair trial by an impartial jury.<sup>29</sup> The court “decline[d] to afford the survey and Professor Moran’s conclusions the weight attributed by Defendants” finding, *inter alia*, that the “size of the statistical sample ... [wa]s too small to be representative of the population of potential jurors in Miami-Dade County.”<sup>30</sup>

In September 2000, Campa moved for reconsideration of the denial of the motion for change of venue. In support of the reconsideration motion, he submitted news articles containing information that he provided the court both during an *ex parte* sidebar within the change of venue motion hearing and in his

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<sup>27</sup> R4-498, Ex. A-4.

<sup>28</sup> R3-443 at 11.

<sup>29</sup> *United States v. Hernandez*, 106 F.Supp.2d 1317 (S.D.Fla.2000); R5-586.

<sup>30</sup> *Hernandez*, 106 F.Supp.2d at 1323-24.

motion for leave to file his motions for foreign witness depositions *ex parte*.<sup>31</sup> He explained in the reconsideration motion that the information had been previously provided to the court *ex parte* because it disclosed the defendants' theory of defense and that he sought the foreign witnesses to support that theory.<sup>32</sup> He argued that the news articles discussing "the defendants' tacit admission that they were keeping an eye on several extremist anti-Castro groups on behalf of the Cuban government, and that Cuban citizens and officials [we]re prepared to testify on behalf of the defendants" had aggravated the prejudice in the Miami community.<sup>33</sup> He noted that the articles characterized the defendants as Cuban agents who would call Cuban officials and citizens to testify on their behalf.<sup>34</sup> The district court denied reconsideration, stating that it had previously addressed the defendants' arguments.<sup>35</sup> It again

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<sup>31</sup> R5-656 at 2-3.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 3 (internal punctuation omitted).

<sup>34</sup> *Id.* The following articles were included as exhibits: Rui Ferreira, *Cuba helps defense at spy trial*, MIAMI HERALD, Aug. 18, 2000, at 1B, R5-656, Ex. A; Rui Ferreira, *Funcionarios cubanos irán al juicio de los espías*, NUEVO HERALD, Aug. 18, 2000, at 17A, R5-656, Ex. B; *Cuba colaborará en juicio por espionaje*, NUEVO DIARIO, Aug. 19, 2000, at 61, R5-656, Ex. C; Rui Ferreira, *Un misterioso coronel cubano se suma al caso de los espías*, NUEVO HERALD, Aug. 21, 2000, at 21A, R5-656, Ex. D; *To the point/Mr. President, define "handshake"*, MIAMI HERALD, Sept. 11, 2000, at 6B, R5-656, Ex. F; and *Accused spy seeks release of U.S. documents*, MIAMI HERALD, Sept. 12, 2000, at 33, R5-656, Ex. E.

<sup>35</sup> R6-723 at 2.



explained that it could explore any potential bias during a voir dire examination and carefully instruct the jurors during the trial. Moreover, the district court noted that if it determined “that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time.”<sup>36</sup>

The trial began with jury selection on 27 November 2000.<sup>37</sup> During the trial, the motions for change of venue were renewed through motions for a mistrial based on community events and trial publicity and a government witness’s insinuation that a defense attorney was a spy or a communist.<sup>38</sup> In February 2001, Campa moved for a mistrial and renewed his motion for a change of venue based on the activities during the weekend of 24 February 2001, including the “commemorative flights marking the fifth anniversary of the shoot down of the

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<sup>36</sup> *Id.* at 2-3 (internal quotations omitted).

<sup>37</sup> R6-765.

<sup>38</sup> R70 at 7130-36; R81 at 8947-49. Although the district court did not overtly deny these motions, the motion based on community events and publicity was apparently resolved by “no response” to an inquiry to the jury as to whether they had “seen, heard, read, or [spoken to anyone] about any media accounts related” to the case following the trial’s last recess. R70 at 7136. The motion based on the witness’s insinuation was resolved by an instruction to the jury that the defense attorney’s “job [wa]s to provide a vigorous defense for his client.” R81 at 8955. “[The witness]’s statement regarding [the defense attorney] was inappropriate and unfounded.” *Id.* at 8949.

Brothers to the Rescue aircraft and the number of television interviews and the number of newspaper articles concerning that event.”<sup>39</sup> He argued that the newspapers included “an editorial by the Miami Herald that flatly condemns the Cuban government for this terrorist act” and articles including quotations from CANF members discussing “at length” the facts of the trial.<sup>40</sup> He maintained that “some news events are so great and are so explosive ... that any amount of instructing the jury cannot cure the taint.”<sup>41</sup> The court reserved ruling pending supplementation of the record and then asked whether an inquiry of the jury was requested.<sup>42</sup> Campa answered “[y]es” and, after the inquiry was discussed, the jury was subsequently questioned as to their exposure to the news articles.<sup>43</sup> When none of the jurors responded in any way, the case proceeded.<sup>44</sup>

Two weeks later, on 1 March 2001, Campa, Gonzalez, Hernandez and Medina filed a joint motion for a mistrial and change of venue arguing that the

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<sup>39</sup> R70 at 7130. Brothers to the Rescue [“BTTR”] is “a Miami-based Cuban exile group”, *Hernandez*, 106 F.Supp.2d at 1318, founded by Jose Basulto in 1991 to rescue rafters fleeing Cuba in the Straits of Florida and to bring them to the United States. R80 at 8836-37.

<sup>40</sup> *Id.* at 7130-31.

<sup>41</sup> *Id.* at 7131.

<sup>42</sup> *Id.* at 7133.

<sup>43</sup> *Id.* at 7134-36.

<sup>44</sup> *Id.* at 7136.

events during the weekend of 24 February "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial."<sup>45</sup> They maintained that "[n]o amount of voir dire or instructions to the jury c[ould] cure the taint, whose ripple effects are difficult to measure."<sup>46</sup> They also requested a mistrial "so that their trial can be conducted in a venue where community prejudices against the defendants are not so deeply embedded and fanned by the local media."<sup>47</sup> In May 2001, the district court denied the pending motions for change of venue on the basis of its earlier orders denying a change of venue and finding that

the February 24th issues and events as well as the reporting of those events do not necessitate and did not necessitate a change of venue in this matter .... The jurors were instructed each and every day ... at each and every break and at the conclusion of the day ... not to read or listen or see anything reflecting on this matter in any way and there has been no indication that the jurors did not comply with that directive by the Court.<sup>48</sup>

### *C. Voir Dire*

The court held two status conferences to work

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<sup>45</sup> R8-1009 at 2.

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.*

<sup>48</sup> R120 at 13894-95.

out a two-phase plan for voir dire.<sup>49</sup> In phase one, 168 jurors were screened for problems such as language and hardship through a written questionnaire and oral voir dire questions.<sup>50</sup> In phase two, the 82 remaining prospective jurors were individually questioned regarding media exposure, knowledge and opinions of the case, the Castro government, the United States policy toward Cuba, the Elian Gonzalez case, the Cuban exile community and its reaction to the case, including a possible acquittal.<sup>51</sup>

On the first day of voir dire, the district court addressed isolating the jurors following their exposure to a press conference held by the victims' families on the courthouse steps and their approach by members of the press.<sup>52</sup> The trial judge instructed that she would no longer permit the victims' families to be present during voir dire "if there are efforts made to pollute the jury pool"<sup>53</sup> and instructed the government to speak to the victims' families regarding their conduct.<sup>54</sup> The court also noted that,

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<sup>49</sup> 1SR1 at 5; 1SR2.

<sup>50</sup> R6-766; R22.

<sup>51</sup> The district court disqualified 79 of the 168 venire persons for cause, 32(19%) in Phase 1 and 22(27%) in Phase 2 for Cuba-related animus.

<sup>52</sup> R22 at 111-16; R62 at 6575-76.

<sup>53</sup> R22 at 113.

<sup>54</sup> R22 at 111-16. During the trial, Hernandez moved to enforce the gag order and alleged that two of the government witnesses had violated the order by holding a press conference with the family of one of the victims. R7-938. The district court issued a "narrowly tailored gag order" applicable to the "all

because some of the potential jurors were approached by news media with cameras, she would question them regarding their discussions with the media and instruct the marshals to accompany the jury, with their juror tags removed, as they left the building.<sup>55</sup> The district court then extended the gag order to cover the witnesses and the jurors.<sup>56</sup>

Later that same day, a copy of the Miami Herald which contained an article about the case was found in the jury assembly room.<sup>57</sup> The next day, after Hernandez's attorney commented that the previous day's article was "disturbing," Guerrero's counsel mentioned that he had viewed one of the potential jurors reading the article while in the courtroom.<sup>58</sup> The district judge responded that "the issue is not whether [venire]persons have read or been exposed to publicity about the case of the defendants, but whether they have formed an opinion based upon what they have read. We will go into all of this as we go through individual voir dres."<sup>59</sup> As voir dire

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[trial] participants, lawyers, witnesses, family members of the victims" clarifying that the order extended to "statements or information which is intended to influence public opinion or the jury regarding the merits of the case." R7-978 at 7; R64 at 6759-60.

<sup>55</sup> R22 at 111-12.

<sup>56</sup> R7 at 978 at 2-3; R21 at 117-19; R22 at 119.

<sup>57</sup> R21 at 171.

<sup>58</sup> R23 at 195, 196-97. This juror was later stricken for cause as a result of his personal knowledge of Basulto. R24 at 537-40.

<sup>59</sup> R23 at 197.

continued, a potential juror who evidenced substantial prejudice was isolated and removed from the venire so as to eliminate contact with other potential jurors.<sup>60</sup>

During voir dire, the venire members were questioned about their political opinions and beliefs. Some venire members were clearly biased against Castro and the Cuban government. Peggy Beltran was excused for cause after stating that she would not believe any witness who admitted that he had been a Cuban spy.<sup>61</sup> When asked about the impact any verdict in the case might have, David Cuevas stated that he "would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba-anything dealing with communism they are against," he would suspect that "they would have a strong opinion" on the trial.<sup>62</sup> He explained that he

probably would have a great deal of difficulty dealing with listening to the testimony. I would probably be a nervous wreck, if you want to know the honest truth. I could try to be as objective as possible and be as open minded as possible, but I would have some

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<sup>60</sup> *Id.* at 300, 302-04, 307, 310.

<sup>61</sup> R25 at 782, 789.

<sup>62</sup> R26 at 1068-69.



trouble dealing with the case. I guess I would be a little bit nervous and have some fear, actually fear for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large.<sup>63</sup>

James E. Howe, Jr. expressed concern that, "no matter what the decision in this case, it is going to have a profound effect on lives both here and in Cuba."<sup>64</sup> He believed that the Cuban government was "a repressive regime that needs to be overturned," was "very committed to the security of the United States," and "would certainly have some doubt about how much control [a member of the Cuban military] would have over what they would say [on the witness stand] without some tremendous concern for their own welfare."<sup>65</sup> Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, was "concern[ed] how ... public opinion might affect [his] ability to do his job" because he dealt with a lot of developers in the Hispanic community and knew that the case was "high profile enough that there may be strong opinions" which could "affect his ability to generate loans."<sup>66</sup> Potential juror Luis Mazza said that he did not like the Cuban government and asked "how could you believe" the testimony of an individual connected with the current Cuban

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<sup>63</sup> *Id.* at 1070.

<sup>64</sup> R27 at 1277.

<sup>65</sup> *Id.* at 1278, 1274, 1273.

<sup>66</sup> R26 at 1057, 1059, 1073.

government.<sup>67</sup> Jenine Silverman believed that “Fidel Castro is a dictator” and that there were “things going on in Cuba that the people are not happy about.”<sup>68</sup> Jose Teijeiro thought that Castro had “messed up” Cuba which was “a very bad government ... perhaps one of the worst governments that exist ... on the planet.”<sup>69</sup>

Other venire members indicated negative beliefs regarding Castro or the Cuban government but believed that they could set those beliefs aside to serve on the jury. Belkis Briceno-Simmons said she held a “[v]ery strong” opinion and did not believe in the Cuban system of government but did not feel that it would affect her ability to render a verdict.<sup>70</sup> Ileana Briganti thought she could be impartial, but admitted that “it would be difficult” and that she did not know if she “could be fair.”<sup>71</sup> She said that the case was discussed “every time my [Cuban born] parents have visitors over” and that she knew she would be “a little biased” in favor of the United States as she did not agree with “communism.”<sup>72</sup> David Buker stated that he believed that “Castro is a communist dictator and I am opposed to communism so I would like to see him gone and a democracy

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<sup>67</sup> R27 at 1166, 1168.

<sup>68</sup> R28 at 1452-53.

<sup>69</sup> R26 at 1001-02.

<sup>70</sup> R25 at 880.

<sup>71</sup> *Id.* at 829-31, 834-39.

<sup>72</sup> *Id.* at 829, 831, 834.

established in Cuba.”<sup>73</sup> Haydee Duarte, who was born in Cuba and immigrated to the United States with her family in the late 1950s-early 1960s, had three relatives who were involved in the Bay of Pigs invasion and her husband had participated in the Mariel boat lift<sup>74</sup> to rescue his sister and her family from Cuba.<sup>75</sup> Although she stated that she would be impartial, she said that she saw “Castro as a dictator.”<sup>76</sup> Maria Gonzalez, a Cuban immigrant, said that she did “not approve of the regime ... in Cuba” and was “against communism” but believed she could serve impartially.<sup>77</sup> She remembered the news from the television and the Miami Herald about the planes being shot down.<sup>78</sup> Rosa Hernandez said that,

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<sup>73</sup> *Id.* at 743. Buker was subsequently seated on the jury and named as its foreperson. Although the government notes that Campa’s attorney commented that Buker was “uninvolved or personally disconnected from the experience [of a Cuban]” and that his “general philosophical problem with communism” was “perfectly okay,” Campa’s attorney’s comment was made in the context of his argument concerning striking for cause another juror whose responses were “rooted in personal experience.” *Id.* at 851.

<sup>74</sup> The Mariel boatlift was a “freedom flotilla” in 1980 in which at least 114,900 Cuban political refugees left Cuba through the harbor of Mariel on boats for resettlement in the United States. *See United States v. Frade*, 709 F.2d 1387, 1389 (11th Cir.1983).

<sup>75</sup> R27 at 1240-41.

<sup>76</sup> *Id.* at 1242-47.

<sup>77</sup> R25 at 790-96.

<sup>78</sup> *Id.* at 795.

although her father left Cuba because of communism and she believed that the Cuban government was "oppressive," she believed that she would not be prejudiced.<sup>79</sup> Sister Susan Kuk was the principal of the predominantly (90 percent) Cuban high school attended by the daughter of one of the killed BTTR pilots.<sup>80</sup> She visited the pilot's home and attended his funeral.<sup>81</sup> Despite her relationship with the pilot's daughter, Kuk thought she "could be fair" although "it would be a little difficult."<sup>82</sup> Lilliam Lopez, was born in Cuba and immigrated to the United States with her family, stated that she was "always for the U.S." and "against the Republic of Cuba," did not like Cuba being a communist country, and had relatives living in Cuba.<sup>83</sup> She had a problem with the case because it involved "espionage against the U.S." but indicated that she could set aside her feelings to serve on the jury.<sup>84</sup> John McGlamery commented that he had "no prejudices" but "live[d] in a neighborhood where there [we]re a lot of Cubans" and was "acquainted with people that come from Cuba. That is universal in Dade County."<sup>85</sup> When asked whether he would be concerned about community sentiment if

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<sup>79</sup> R27 at 1227-32.

<sup>80</sup> R24 at 519-21.

<sup>81</sup> *Id.* at 520-21.

<sup>82</sup> *Id.* at 521-22. The district court denied the defendants' request that Sister Kuk be excused for cause. *Id.* at 534-36.

<sup>83</sup> R27 at 1148-50.

<sup>84</sup> *Id.* at 1149, 1151-58.

<sup>85</sup> R26 at 1011, 1012.

he were chosen as a juror, he "answer[ed] ... with some care .... [i]f the case were to get a lot of publicity, it could become quite volatile and ... people in the community would probably have things to say about it."<sup>86</sup> He stated that "it would be difficult given the community in which we live" "to avoid hearing somebody express an opinion" on the case and to follow a court's instruction to not read, listen to, or otherwise expose himself to information about the case.<sup>87</sup> His opinion about the Cuban government was "not favorable" as it was "not a democracy" and was "guilty of assorted [human rights] crimes."<sup>88</sup> Hans Morgenstern initially said that he did not "think he would have any sort of prejudice[ ]" against defendants who were agents of the Cuban government but could not say for certain because of "[t]he environment that we are in. This being Miami. There is so much talk about Cuba here. So many strong opinions either way."<sup>89</sup> He later, however, admitted to having biases against the Cuban government, which he believed was "anti-American" and "tyrannical," and to having "an obvious mistrust ... of those affiliated with the [Cuban] government."<sup>90</sup> He also indicated that he would be concerned about returning a not guilty verdict because "a lot of the people [in Miami] are so right wing fascist," because he would face "personal criticism" and media

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<sup>86</sup> *Id.* at 1012

<sup>87</sup> *Id.* at 1018-19.

<sup>88</sup> *Id.* at 1013.

<sup>89</sup> *Id.* at 1021-22.

<sup>90</sup> *Id.* at 1023, 1027-28, 1032.

coverage, and because he had concerns for what might happen after a verdict was returned.<sup>91</sup> He believed the case to be “a high profile case” and that he had been videotaped by the media when leaving the courthouse.<sup>92</sup> Angel De La O, who was born in Cuba and immigrated to the United States with his parents, initially stated that he did not think he “could make a fair judgment” in the case and would be prejudiced because he had “a lot of family ties in Cuba” including uncles, aunts, and cousins but later answered that he could set aside his concerns if selected for the jury.<sup>93</sup> He was troubled about returning a verdict in the case based on his concern for something happening to his “family ... in Cuba” and the notoriety of the case in Miami.<sup>94</sup> He also said that he had “heard a lot about the case ... on the news [and from] people talking about” it.<sup>95</sup> Connie Palmer believed that Castro was “a very bad person” and, when asked whether her opinion regarding the Cuban government would affect her ability to fairly weigh the evidence, answered “I don’t think so.... I don’t know. I have lived in South Florida for 36 years and I have seen many changes.”<sup>96</sup> Palmer had known Sylvia Iriondo, who had been a passenger in Basulto’s airplane on the day of the shoot-down and who was

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<sup>91</sup> *Id.* at 1024-27, 1030.

<sup>92</sup> *Id.* at 1026.

<sup>93</sup> R27 at 1139-41, 1143-48.

<sup>94</sup> *Id.* at 1142.

<sup>95</sup> *Id.* at 1140, 1146-47 (O remembered reading about the case but did not remember specific information).

<sup>96</sup> R28 at 1424-25.



named as a government witness, for about eight years.<sup>97</sup> She also knew that Iriondo was “very involved with the Brothers to the Rescue and very strongly keeping the Cuban community together in Miami.”<sup>98</sup> Joseph Paolercio did not think that it would affect his ability to be impartial but he “was not happy” with United States-Cuban relations following the Mariel boat lift.<sup>99</sup> He did not like the freedom that Cubans had to immigrate to the United States because immigrants from other countries were treated differently and “sometimes [he felt like] a stranger in [his] own country” when he needed to ask someone to speak English instead of Spanish.<sup>100</sup> Barbara Pareira had “many close Cuban friends,” including her husband’s business partner who was a member of a group that rescued Cubans fleeing the island.<sup>101</sup> She believed that she could be impartial but had concerns about returning a verdict in Miami “because of the Cuban population here.”<sup>102</sup> She “was a little distressed with the way that the [Cuban] exile community handled” the Elian Gonzalez matter because she did not “like the crowd mentality, the mob mentality that interferes with what I feel is a

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<sup>97</sup> *Id.* at 1433.

<sup>98</sup> *Id.* at 1437. The district court denied the defendants’ request to strike Palmer for cause. R28 at 1442.

<sup>99</sup> R25 at 818-22.

<sup>100</sup> *Id.* at 820.

<sup>101</sup> R27 at 1118-19, 1121-23, 1175-76.

<sup>102</sup> *Id.* at 1119-28, 1177.

working system.”<sup>103</sup> She strongly believed that the Cuban government was an oppressive dictatorship.<sup>104</sup> Pareira remembered news reports regarding “the planes being shot down” and several men dying, and that it was a “very bad situation” and frightening because of the possibility of military action.<sup>105</sup> Sonia Portalatin had a “strong” opinion about the Cuban government because she was “against communism.”<sup>106</sup> Leilani Triana testified that, although her parents were from Cuba and her grandfather had been politically involved in Cuba before Castro, she could be impartial.<sup>107</sup> Eugene Yagle admitted having “a strong opinion” about the Cuban government as he could not “reconcile [him]self to that form of Government.”<sup>108</sup>

Finally, other venire members espoused indifference toward Castro or the Cuban government. John Gomez had traveled to Cuba with his family “to take goods” and medicines to friends and had friends who frequently traveled to Cuba; he knew of no reasons why he should not serve on the jury.<sup>109</sup> He remembered hearing or reading “years

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<sup>103</sup> R27 at 1120, 1122.

<sup>104</sup> *Id.* at 1120.

<sup>105</sup> *Id.* at 1126, 1176-77.

<sup>106</sup> R25 at 861. Portalatin was subsequently seated as a juror.

<sup>107</sup> R27 at 1249-50.

<sup>108</sup> *Id.* at 1296-97. Yagle was subsequently seated as a juror.

<sup>109</sup> R25 at 841-43.

back" "something about Brothers to the Rescue" and someone in the group who was a spy for the Cuban government.<sup>110</sup> Luis Hernandez, who had family in Cuba, thought he could be fair, but was unable to say whether he would be able to believe a witness who was a member of the communist party in Cuba.<sup>111</sup> Miguel Hernandez's parents and grandparents had immigrated from Cuba and he had distant relatives who remained in Cuba but he had no opinions regarding the Cuban government, the trial, or the publicity surrounding it.<sup>112</sup> Florentina McCain felt sympathy for the people living in Cuba but believed that she would be impartial as a juror.<sup>113</sup> She knew from the media that "airplanes were shot down in Cuba a couple of years ago" and that "some families ... gathered to remember the anniversary of the incident" a few weeks before voir dire.<sup>114</sup> Michelle Peterson also had concerns about community reaction to a verdict because she did not "want rioting and stuff to happen like what happened with the Elian case. I thought that got out of hand."<sup>115</sup>

After one potential juror was excused for cause because he had attended the funeral for a victim of the shoot-down, Hernandez moved to have another potential juror, Sister Kuk, excused for the same

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<sup>110</sup> *Id.* at 846.

<sup>111</sup> R27 at 1301-08.

<sup>112</sup> *Id.* at 1134-39.

<sup>113</sup> R26 at 990-96.

<sup>114</sup> *Id.* at 995.

<sup>115</sup> R26 at 938, 945.

reason. The government opposed this request to strike,<sup>116</sup> maintaining that Sister Kuk attended the service as a professional, and that “[t]here were masses after the shoot-down all over town and numerous people attended.”<sup>117</sup>

Many of the potential jurors who had personal contact with the victims, their family members, and BTTR were not questioned during Phase II or were excused for cause.<sup>118</sup> For example: potential juror Jessica de Arcos knew Rita and Jose Basulto;<sup>119</sup> potential juror Daniel Fernandez knew Jose Basulto;<sup>120</sup> potential juror Tim Heatly knew Jose Basulto;<sup>121</sup> potential juror Sister Kuk knew government witness Marlene Alejandre, the widow of one of the killed BTTR pilots;<sup>122</sup> potential juror Caroline Rodriguez knew Marlene Diaz, the daughter of one of the BTTR victims.<sup>123</sup> The defendants also used a peremptory challenge to excuse Lazaro Barreiro, a former national bank examiner, who had assisted the United States Attorney’s office in Miami

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<sup>116</sup> R24 at 534.

<sup>117</sup> *Id.* at 535.

<sup>118</sup> The victims’ family members attended the trial, and were seated in a designated area in the courtroom. R25 at 717-18.

<sup>119</sup> R21 at 139; R23 at 251.

<sup>120</sup> R24 at 458, 508-10.

<sup>121</sup> R21 at 139; R23 at 254.

<sup>122</sup> R24 at 458.

<sup>123</sup> *Id.* at 373, 385-86.

for three years during a grand jury investigation.<sup>124</sup> Potential juror Placencia knew many of the named witnesses, and had helped raise money for BTTR while working for one of the local Cuban radio stations.<sup>125</sup> The district court granted the defendants additional peremptory challenges, for a total of 18, due to the "number of very close decisions made by the Court" on challenges for cause on jurors whose claims of impartiality were difficult to believe.<sup>126</sup> The defendants used 16 of their peremptory challenges to excuse jurors whose answers revealed biases against them.<sup>127</sup> The government exercised its peremptory challenges as to the three prospective jurors who failed to express negative views toward Cuba.<sup>128</sup> Each of the Cuban-American prospective jurors was eliminated, despite the government's reverse *Batson* challenge.<sup>129</sup> Following voir dire, although complimenting the district court on the conduct of voir dire, Medina's attorney indicated his concern that there were three women seated on the jury who exemplified Professor Moran's opinion that certain

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<sup>124</sup> R25 at 655, 690, 709.

<sup>125</sup> *Id.* at 682-84.

<sup>126</sup> R27 at 1254, 1382.

<sup>127</sup> *Id.* at 1375-84; R28 at 1513; R29 at 1564; 1SR1 at 5-6, 11.

<sup>128</sup> R25 at 776-70, 809-12; R26 at 937-41.

<sup>129</sup> R28 at 1508-11; see *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (holding that the Equal Protection Clause guarantees that members of a defendant's race are not excluded from a defendant's jury on the basis of race).

community members who were subjected to community pressures were unable to admit their underlying prejudices.<sup>130</sup>

From the beginning of voir dire until the completion of the trial, the prospective and actual jurors<sup>131</sup> were admonished not to discuss the case with anyone and to have no contact with media accounts or anything else related to the case.<sup>132</sup> The jurors were also instructed about the presumption of innocence.<sup>133</sup>

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<sup>130</sup> R27 at 1373-76.

<sup>131</sup> The selected jurors were Diana Barnes, R24 at 601-02; R25 at 800-05; Foreperson David Buker, R24 at 555, 561-62, 571, 590; R25 at 741-49; Richard Campbell, R22 at 60; R26 at 1032-39; Migdalia Cento, R22 at 69-70; R27 at 1128-33; R29 at 1556, 1559-62; Omaira Garcia, R25 at 659-61, 885-91; Sergio Herran, R22 at 147-52; R27 at 1219-25; Wilfred Loperena, R22 at 41-43, 88; R26 at 969-75; Juanito Millado, R22 at 15, 66; R27 at 1105-17; R28 at 1517-19; Gil Page, R25 at 556, 574, 583-87; R25 at 737-41; Elthea Peeples, R22 at 38-40; R26 at 956-62; Sonia Portalatin, R24 at 619; R25 at 858-65; and Deborah Vernon, R22 at 125, 142-43, 147, 153; R27 at 1233-39. Alternates were Marjorie Hahn, R22 at 131; R23 at 204-05, 250-51; R27 at 1342-50; Beverly Holland, R23 at 210-14, R27 at 1355; Miguel Torroba, R23 at 204; R27 at 1334-42; and Eugene Yagle, R22 at 144, 165-67; R27 at 1294-1300; R28 at 1517-20; R29 at 1553-57, 1601-02, 1638. Millado was excused due to family illness before the jurors were empaneled; Yagle was seated in his place. R29 at 1550-57, 1601-02, 1638.

<sup>132</sup> R21 at 44-45; R22 at 119; R116 at 13492-93.

<sup>133</sup> R21 at 26.



*D. The Media*

Throughout the trial, the district court worked at controlling media access. During a discovery hearing, the district court reminded the parties and their attorneys that they were to refrain from releasing information or opinions which could interfere with a fair trial or prejudice the administration of justice.<sup>134</sup> The district judge stated that she was "increasingly concerned" that various persons connected with the case were not following her order based on the "parade of articles appearing in the media about this case."<sup>135</sup> In particular, she commented that an article about Medina's pending motion to incur expenses to poll the community "was the lead story in the local section on Saturday in the Miami Herald."<sup>136</sup> She warned all counsel and agents associated with the case that appropriate action would be taken and that the U.S. Attorney's Office would be held responsible.<sup>137</sup> She directed that "[t]his case ... not ... get advertised anywhere in the media for any reason whatsoever."<sup>138</sup>

As the case proceeded to trial, media attention expanded. On the first day of voir dire, the district court observed that one of the victims' families conducted a press conference which was filmed outside of the courthouse during the lunch break and

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<sup>134</sup> R18 at 14.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 15.

<sup>137</sup> *Id.* at 14-15.

<sup>138</sup> *Id.* at 17.

that some of the jurors were approached by the media.<sup>139</sup> She then acknowledged that “[t]here is a tremendous amount of media attention for this case.”<sup>140</sup>

The district court extended the sequestration order to cover the jury and witnesses to ensure that they had no contact with the media,<sup>141</sup> sealed voir dire questions during the jury selection,<sup>142</sup> and limited the sketching of witnesses for their protection.<sup>143</sup> It permitted, however, the media “access to all the evidence admitted into the trial record.”<sup>144</sup>

#### *E. The Trial*

The case proceeded to a jury trial on 27 November 2000. On 30 November, Hernandez’s attorney raised the issue of the seating in the courtroom, specifically, the prejudice resulting from the assigned seating of the victims’ families and the lack of seating available for the defendants’ families.<sup>145</sup> He argued that, as witnesses, the victims’ families should not be seated behind the government.<sup>146</sup> The district court then reassigned the

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<sup>139</sup> R21 at 111, 117-19; R22 at 111-16.

<sup>140</sup> *Id.* at 115.

<sup>141</sup> R22 at 119.

<sup>142</sup> R24 at 625-26.

<sup>143</sup> R9-1126.

<sup>144</sup> *Hernandez*, 124 F.Supp.2d at 704; R7-808.

<sup>145</sup> R25 at 712-13.

<sup>146</sup> *Id.* at 714.

seating, so that the victims' families were seated in a row removed from the government and the defendants' families were given assigned seats.<sup>147</sup>

Defense witness Jose Basulto, a Cuban-American who had worked with the Central Intelligence Agency to infiltrate the Cuban government, testified that he was "dedicated to promot[ing] democracy in Cuba."<sup>148</sup> When questioned about his activities during 1995, he responded by asking Hernandez's defense counsel whether he was "doing the work" of the Cuban intelligence community.<sup>149</sup> At the request of Hernandez's attorney, the trial judge struck the comment and the jury was instructed to disregard the comment.<sup>150</sup> Following a recess, Campa's counsel argued that Basulto's insinuation was

precisely the kind[ ] of problem[ ] that we were afraid of when we filed our motions for a change of venue, and ... in the aftermath of the events of February 24, 2001, we renewed our motion for ... a change of venue based on the pretrial publicity, the publicity that has been generated during the course of the trial and our concern with our ability to obtain a fair trial in this community given that background.

This red baiting is absolutely intolerable, to accuse [Hernandez's attorney] because he is

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<sup>147</sup> *Id.* at 717-18.

<sup>148</sup> R80 at 8822, 8825.

<sup>149</sup> R81 at 8945.

<sup>150</sup> *Id.*

doing his job, of being a communist. It is unfortunate, it is the type of red baiting we have seen in this community before and we are concerned how it affects the jury. Here we are asking the jury to make a decision based on the evidence and only based on testimony and we are left and they are left with wondering what will they be accused. These jurors have to be concerned unless they convict these men of every count lodged against them, people like Mr. Basulto who hold positions of authority in this community, who have access to the media, are going to call them of being Castro sympathizers, accuse them of being Castro sympathizers, accuse them of being spies and this is not the kind of burden this jury can shoulder when it is asked to try and decide those issues based on the evidence at trial.

When someone can on the stand gratuitously and maliciously accuse [Hernandez's attorney] of being a spy[, it] sends a message to these ladies and gentlemen if they don't do what is correct, they will be accused of being communists too. These people have to go back to their homes, their jobs, their community and you can't function in this town if you have been labeled a communist, specially by someone of Mr. Basulto's stature.<sup>151</sup>

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<sup>151</sup> *Id.* at 8947-49.

He asked that the court consider this event and the other events in its consideration of the pending motion for change of venue.<sup>152</sup>

*F. The Evidence at Trial*

Campa, Gonzalez, Guerrero, Hernandez, and Medina, as well as others, were members of a Cuban government intelligence operation identified as "La Red Avispa," or the Wasp Network, which was charged with infiltrating, monitoring, and disrupting the work of certain militant Cuban exiles in South Florida.<sup>153</sup> Directorate Intelligence ("DI") Officers

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<sup>152</sup> *Id.* at 8949. In the alternative, counsel for Campa and Hernandez requested a jury instruction addressing Basulto's attack on Hernandez's counsel's credibility. R81 at 8949-53. The court found that the statements could affect "how the jurors view" Hernandez's counsel and instructed the jury that Hernandez's attorney's "job is to provide a vigorous defense for his client. Mr. Basulto's statement regarding [Hernandez's counsel] was inappropriate and unfounded." *Id.* at 8955.

<sup>153</sup> Govt. Exs. DAV 109 at 6-7; DG 101 at 2, 102 at 30, 117, 137 at 2. The Cuban government maintains the following intelligence operations: the Directorate of Military Intelligence ("DIM") under the Ministry of Revolutionary Armed Forces, and the Directorate of Intelligence ("DI") and the Directorate of Counterintelligence ("DCI") under the Ministry of the Interior. R44 at 3700-05, 3707. The DI collects intelligence outside of Cuba, focusing primarily on the United States; the DCI is responsible for intelligence regarding counter-revolutionary activities inside of Cuba. R44 at 3704, 3707. The DI is organized into many operational components, including M-I which handles non-military United

Hernandez, Medina, and Campa supervised agents, including agents Gonzalez and Guerrero.<sup>154</sup> The Wasp Network reported information to Cuba on: (1) the activities of anti-Castro organizations in Miami-Dade County;<sup>155</sup> (2) the operation of United States military installations including those at Boca Chica Naval Air Station ("NAS"),<sup>156</sup> MacDill Air Force Base

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States government agency intelligence, M-III which handles the collecting, correlating, and reporting of gathered information, M-V which handles the operation and support of "illegal" intelligence officers ("IO" s) who enter the United States illegally with a false identity and identification, M-XIX which handles counter-revolutionary individuals and organizations outside of Cuba. R44 at 3708-11, 3713; R46 at 3957.

<sup>154</sup> Govt. Exs. DG 107 at 23; DAV 113 at 6. The IOs, as intelligence officers, were full-time employees of the DI who were trained in all aspects of intelligence work. R44 at 3719-20. Agents were individuals who worked as support for the IOs by providing information. The agents were paid for that information, but were not employees of the DI. R44 at 3720. The agents were supervised by other agents or legal or illegal officers. *Id.*

Guerrero functioned as both an IO and, in penetrating the Naval Air Station ("NAS") at Key West, Florida, as an agent. Govt. Ex. DAV 122 at 6, 10. While working at the NAS, he traveled at least twice to the DI headquarters in Cuba for training and debriefing on military matters. Govt. Exs. DG 108 at 31-33; DL 101 at 4; DL 103 at 13; DL 104 at 4; HF 136.

<sup>155</sup> R45 at 3870-71; Govt. Exs. DG 107 at 58-67, 129

<sup>156</sup> The NAS is the southernmost military base in the continental United States and is located about 90 miles from Cuba. R74 at 7910, 7920-21. It has an active airfield and several



("MacDill"), Barksdale Air Force Base ("Barksdale"), and the United States Southern Command ("SouthCom");<sup>157</sup> and (3) United States political and law enforcement activities.<sup>158</sup> The group was also charged with intimidating Cuban-American individuals and organizations with threatening letters and telephone calls;<sup>159</sup> penetrating United States Congressional election activities;<sup>160</sup> scouting and assessing potential sources of information and possible new recruits;<sup>161</sup> and carrying communications, cash, and other items between

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complexes of buildings used by the Air Force, Army, Coast Guard, Marines, and Navy. *Id.* at 7908-10. The public has access to the base roadways, but not to its buildings. *Id.* at 7912-13, 7915-17. The base is the primary United States military installation for conflicts in the Caribbean, and is used for national defense including intermediate and advanced combat air training and drug interdiction. *Id.* at 7910-11, 7920-22.

<sup>157</sup> Govt. Exs. HF 103; DG 107 at 12-20; DG 108 at 2-3. Southcom is one of the United States Department of Defense's five centralized geographic command centers for unified military operations within an area of responsibility ("AOR"). R46 at 4009-10. As of 1987, Southcom's AOR covered the Caribbean, including Cuba, and Latin America. *Id.* at 4012-14. Southcom's Miami headquarters is a secure, tightly-controlled facility housing "open storage" classified top secret, secret, and confidential materials. R46 at 4018-19.

<sup>158</sup> R103 at 11907-08, 11911-13.

<sup>159</sup> R45 at 3793-99; Govt. Exs. DG 108 at 28-29; DG 127 at 7-8; DC 101 at 11-19; Dho 101 at 2-6.

<sup>160</sup> Govt. Ex. HF 143.

<sup>161</sup> Govt Exs. DG 141 at 6-7; DAV 118 at 14-19.

Miami and other United States-based DI officers and agents.<sup>162</sup> None of the Wasp Network members notified the United States Attorney General that they were acting as agents of the Cuban government.<sup>163</sup> Members of the Wasp Network and the DI frequently communicated and delivered items through the Cuban delegations' diplomatic cover.<sup>164</sup>

The Wasp Network members evaded detection through the use of false identities and code names, counter surveillance for contacts and communications, and DI decrypted written and broadcast communications.<sup>165</sup> Campa, Hernandez, and Medina falsely identified themselves through elaborate "legends," or biographies, which were supported by documents provided by the DI, and used these documents when they dealt with United States border and law enforcement personnel and when they obtained drivers licenses, passports, and other identification.<sup>166</sup> They also had back-up, or "reserve,"

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<sup>162</sup> Govt. Exs. 384, 865.

<sup>163</sup> R61 at 6404-15.

<sup>164</sup> R73 at 7821-46; R74 at 7871-78; Govt. Ex. HF-144.

<sup>165</sup> R40-3197; R43 at 3628-29; R44 at 3731-32, 3764-65; Govt. Exs. 1A; DAV 101 at 29; DAV 121; DG 118 at 2-3; HF 101-144.

<sup>166</sup> R33 at 2145; Govt. Exs. 4; 5-1; 5-2; 5-3; 5-4; 8-1; 8-3; 8-4; 11; 12-3; 12-4; 12-5; 12-8; DAV 118 at 7-12; DG 105 at 2-16; DG 125; DG 135 at 3-11; DG 136. Under their false identities, Campa was also known as Fernando Gonzalez Llort, Oscar, or Vicky, R101 at 11714; Gonzalez was known as Agent Castor; Guerrero was known as Lorient, Govt. Exs. DAV 102

false identities in which the agents used the names and other identification of United States citizens who had visited Cuba. The agents used these back-up identities when they traveled or if their primary "legend" was compromised.<sup>167</sup>

The Cuban exile groups of concern to the Cuban government included Alpha 66,<sup>168</sup> Brigade 2506,

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at 1; DAV 129 at 2; Hernandez was known as Girardo, Giro, or Manuel; and Medina was known as Allan or Ramon Labanino; R101 at 11721-23.

<sup>167</sup> R34 at 2321-40; R44 at 3724-26; R49 at 4677-78; R66 at 6833-35; R69 at 6981-7016; Govt. Exs. 5-6; 6; 7; 9; DAV 110 at 2; DAV 118 at 12-14; DG 126 at 9-10; SF 14; SF 15; SG 34; SG 53.

<sup>168</sup> Orlando Suarez Pineiro, a Cuban-born permanent resident of the United States, served as a captain in Alpha 66 for about six years. R90 at 10373-74. On 20 May 1993, he and other Alpha 66 members were arrested while on board a boat with weapons in the Florida Keys. *Id.* at 10391-92, 10397-401, 10415-16. The weapons included pistols with magazines and ammunition, 50 caliber machine guns with ammunition, rifles with clips, and an RK. *Id.* at 10397-400. Pineiro was tried and found not guilty of possession of a Norinko AK 47 rifle and two pipe bombs. *Id.* at 10424. Pineiro and other Alpha 66 members were also stopped and released while on board a boat on 10 June 1994, but their weapons and boat were seized. *Id.* at 10409, 10411-14. The seized weapons included a machine gun and AK 47s. *Id.* at 10411-14.

United States Customs Agent Ray Crump testified that, on 20 May 1993, he participated in the arrest of several men whose boat was moored at a marina in Marathon, Florida. *Id.* at 10429. The boat held: several handguns; automatic rifles, including one fully automatic rifle; four grenades; two pipe bombs; a 40 millimeter grenade launcher; a 50 caliber Baretta semiautomatic rifle; and a bottle printed with "Alpha 66" which contained "Hispanic propaganda ..., ... crayons, razors, stuff of

that nature." *Id.* at 10431-33, 10434. He also participated in an investigation of a vessel south of Little Torch Key, about ten miles south of Marathon, Florida, on 11 July 1993. *Id.* at 10433-34. The vessel was carrying four men, numerous weapons, and "Alpha 66 type propaganda." *Id.* at 10434. The weapons on the vessel included an AR 15, two 7.6 millimeter rifles and ammunition magazines. *Id.* at 10438. Following this investigation, the men were not arrested, and the weapons and vessel were not seized. *Id.* at 10438-39.

United States Customs Agent Rocco Marco said that he encountered four anti-Castro militants on 27 October 1997, after their vessel, the "Esperanza", was stopped in waters off Puerto Rico. R90-10449. He explained that U.S. Coast Guard officers searched the vessel and found weapons and ammunition "hidden in a false compartment underneath the stairwell leading to the lower deck." The officers found food, water bottles, camouflage military apparel, night vision goggles, communications equipment, binoculars, two Biretta 50 caliber semiautomatic rifle with 70 rounds of ammunition, ten rounds of 357 hand gun ammunition, and magazines and clips for the firearms. R90 at 10453-59. The leader of the group, Angel Manuel Alfonso of Alpha 66, confessed to Rocco that they were on their way to assassinate Castro at ILA Marguarita, where he was scheduled to give a speech. *Id.* at 10452, 10467. Alfonso explained to Rocco that "his purpose in life was to kill [Castro]" and that it did not "matter if he went to jail or not. He would come back and accomplish the mission." *Id.* at 10468.

Debbie McMullen, the chief investigator with the Federal Public Defender's Office, testified that Ruben Dario Lopez-Castro was an individual associated with a number of anti-Castro organizations, including PUND and Alpha 66. R97 at 11267. Lopez and Orlando Bosch planned to ship weapons into Cuba for an assassination attempt on Castro. *Id.* at 11254. Bosch had a long history of terrorist acts against Cuba, and prosecutions and convictions for terrorist-related activities in the United States and in other countries. Campa Ex. R77 at 18-35.

BTTR, Independent and Democratic Cuba ("CID"), Comandos F4,<sup>169</sup> Commandos L, CANF,<sup>170</sup> the Cuban

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<sup>169</sup> Rodolfo Frometa testified that, although he was born in Cuba, he was a citizen of the United States. R91 at 10531. He explained that he was a United States representative of a Cuban organization called Comandos F4, which was organized "to bring about political change in a peaceful way in Cuba" and included members both inside of and exiled from Cuban. *Id.* at 10532. He identified himself as the Commandate Jefe, or commander-in-chief, of F4 in the United States. *Id.* at 10534. He stated that, since 1994, all F4 members must sign a pledge that they will "respect the United States laws" and not violate either Florida or federal law. *Id.* at 10535.

Frometa stated that, before Comandos F4, he was involved with Alpha 66, another organization supporting political change in Cuba, from 1968 to 1994 and served as their commander "because of his firm and staunch position ... against Castro." R91 at 10541-42. As a member of Alpha 66, Frometa was stopped by police officers and questioned regarding his possession of weapons. He was first stopped on 19 October 1993, while in a boat which had been towed to Marathon, Florida, and was questioned regarding the onboard weapons. *Id.* at 10564-66. The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini 14 rifle caliber 223 with a scope. *Id.* at 10564-66. On 23 October 1993, he was again stopped while he and others were driving a truck which was pulling a boat toward the Florida Keys. *Id.* at 10542-44. Frometa explained that they were carrying weapons to conduct a military training exercise in order to prepare for political changes in Cuba or in the case of a Cuban attack on the United States, and once the officers determined that their activities were legal, they were sent on their way. *Id.* at 10544-48, 10563. The weapons were semi-automatic and included an R15, an AK 47, and a 50 caliber machine gun. *Id.* at

10545-47. Frometa and several other Alpha 66 members were once more stopped and released on 7 February 1994 for having weapons on board his boat. Because a photograph of the group was "published in the newspapers" "[e]verybody in Miami" knew that they were released. *Id.* at 10569. On 2 June 1994, Frometa, by then a member of F4, was arrested after attempting to purchase C4 explosives and a "Stinger antiaircraft missile" in order to kill Castro and his close associates in Cuba. *Id.* at 10571-72, 10574-76, 10579-80. Frometa acknowledged that the use of the C4 explosive could have injured Cubans who worked at a military installation, *Id.* at 10579, but that they had caused the "death of four U.S. citizens, the 41 people including 20 or 21 children who died; the mother of the child Elian, plus thousands and thousands who have died in the Straits of Florida." *Id.* at 91-10581.

<sup>170</sup> Percy Francisco Alvarado Godoy and Juan Francisco Fernandez Gomez testified by deposition. R95 at 11012; R99 at 11558-59. Godoy, a Guatemalan citizen residing in Cuba, described attempts between 1993 and 1997 by affiliates of the CANF to recruit him to engage in violent activities against several Cuban targets. 2SR-708, Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64. He said that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. *Id.* at 44-46. In connection with the same plot, he flew to Guatemala in November 1994 to obtain the explosives and detonators to be used and met with, among others, Luis Posada Carriles, a Cuban exile with a long history of violent acts against Cuba. *Id.* at 49, 52, 56-58. Unknown to the CANF members, Godoy was cooperating with the Cuban authorities, denounced their plans, and later testified at the trial of one of the conspirators in Cuba. *Id.* at 22, 24, 26, 31, 58-59, 65, 70, 76, 81-82, 86, 90, 109.

Gomez, a citizen and resident of Cuba, described numerous attempts between 1993 and 1997 by persons associated with the CANF to recruit him to



American Military Council ("CAMCO"), the Ex Club, Partido de Unidad Nacional Democratica (PUND) or the National Democratic Unity Party (NDUP), and United Command for Liberation (CLU).<sup>171</sup> Alpha-66 ran a paramilitary camp training participants for an invasion of Cuba, had been involved in terrorist attacks on Cuban hotels in 1992, 1994, and 1995, had attempted to smuggle hand grenades into Cuba in March 1993, and had issued threats against Cuban tourists and installations in November 1993. Alpha-66 members were intercepted on their way to

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engage in violent activities against several Cuban targets. Gomez also testified that, beginning in September 1994, he was asked to place a bomb at the Caberet Tropicana, a popular Havana nightclub and tourist attraction. In 1996 and 1998, Gomez was approached by Borges Paz of the anti-Castro organization the Ex Club, 2SR-708, Att. 1 at 9, 12-14, 20, 39; Gomez said that Paz invited him to join their organization to build and place bombs at tourist hotels and at the Che Guevara Memorial in Santa Clara, Cuba. *Id.* at 16, 19, 22. After returning to Cuba, Gomez informed the Cuban authorities of the Ex Club's plans. *Id.* at 20, 35-36. As a result of his work for the United States government, Gomez said that he was estranged from his family in the United States, including a daughter in Florida, and had received threatening phone calls. *Id.* at 64-66.

<sup>171</sup> R83 at 9162, 9165-67; R90 at 10373-74, 10391-92, 10397-10401, 10409, 10411-14, 10415-16, 10429, 10431-34, 10449, 10452-59, 10467-68; R91 at 10541-42, 10544-48, 10563-66, 10571-72, 10574-76, 10579-80; R97 at 11267, 11291-97; 2SR-708, Att. 1 at 9, 12-14, 16, 19-20, 22, 35-36, 39; Att. 2 at 10-13, 21-24, 27-28, 33-34, 44-46, 61, 63-64; Campa Exs. R-29D, R-29F, R-29G, R-29H.

assassinate Castro in 1997. Brigade 2506 ran a youth paramilitary camp.<sup>172</sup> BTTR flew into Cuban air space from 1994 to 1996 to drop messages and leaflets promoting the overthrow of Castro's government. CID was suspected of involvement with an assassination attempt against Castro. Comandos F4 was involved in an assassination attempt against Castro. Commandos L claimed responsibility for a terrorist attack in 1992 at a hotel in Havana. CANF planned to bomb a nightclub in Cuba. The Ex Club planned to bomb tourist hotels and a memorial. PUND planned to ship weapons for an assassination attempt on Castro. Following each attack, Cuba had advised the United States of its investigations and had asked the United States' authorities to take action against the groups operating from inside the United States.<sup>173</sup>

The BTTR's flights over Cuba were of particular concern to the Cuban government. Sometime after 13 July 1995, the Federal Aviation Administration ("FAA") conveyed the Cuban government's threats to the BTTR that unauthorized planes flying into Cuban airspace would be forced to land or shot down.<sup>174</sup> On 9 and 13 January 1996, BTTR dropped thousands of leaflets into Cuba, which were printed with portions of the United Nations' Universal Declaration of Human Rights and which encouraged

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<sup>172</sup> R97 at 11296-97.

<sup>173</sup> Campa Exs. R-29C; R-29F; R-29H; GH Exs. 16C, 24.

<sup>174</sup> R83 at 9166-67.

Cubans to fight for their rights.<sup>175</sup> In January 1996, BTTR President and Director Jose Basulto appeared on a United States-controlled Radio Marti program broadcast into Cuba claiming responsibility for dropping leaflets earlier that month and stating that BTTR advocated the use of civil disobedience.<sup>176</sup> The Cuban government protested to the United States about the airspace violations, complained that the measures used by the FAA to impede such flights were insufficient, and noted that unauthorized flights would be interrupted by force.<sup>177</sup>

On 22 January 1996, the FAA's liaison to the State Department wrote the regional FAA office in Miami regarding these Cuban airspace violations. She stated that she had been advised of another unauthorized flight on 20 January, and that

this latest overflight can only be seen as further taunting of the Cuban Government. State is increasingly concerned about Cuban reaction to these flagrant violations. They are also asking from the FAA what is this agency doing to prevent/deter these actions ... [and] our case against Basulto. Worst case scenario is that one of these days the Cubans will shoot down one of these planes and the FAA better have all its ducks in a row.<sup>178</sup>

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<sup>175</sup> R58 at 5919, 5922-23; Govt. Exs. HF 108 at G-3, 113 at G-3.

<sup>176</sup> GH Ex. 37 at 2-4, 6-8.

<sup>177</sup> GH Ex. 18E.

<sup>178</sup> GH Ex. 18F.

In early February 1996, a member of a delegation reviewing Cuban military activities was advised by the Cuban military that it was frustrated by the lack of a favorable response from the United States considering its repeated protests regarding the light civilian airplane flights from Florida which were violating Cuban airspace.<sup>179</sup> Thereafter, the delegation member met with officials from the United States Departments of Defense and State and advised them of what he perceived as a warning that Cuba was considering shooting down the flights.<sup>180</sup>

On 23 February 1996, the FAA issued a "Cuba Alert" to several United States agencies. In the alert, the FAA advised they had

received a call from State Dept. indicating that since Brothers to the Rescue [BTTR] and its leader Basulto support and endorse the Concilio Cubano [an umbrella dissent organization] it would not be unlikely that the BT[T]R attempted an unauthorized flight into Cuban airspace tomorrow, in defiance of the GOC [Government of Cuba] and its policies against dissidents. State Dept. cannot confirm this will happen and is in touch with local law enforcement agencies to better determine what's the situation. I've reiterated to State that the FAA cannot PREVENT flights such as this potential one, but that we'll alert our folks in case it happens and we'll document it

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<sup>179</sup> R76 at 8198-99, 8203-04.

<sup>180</sup> *Id.* at 8204-05.

(as best we can) for compliance/enforcement purposes.

State has also indicated that the GOC would be less likely to show restraint (in an unauthorized flight scenario) this time around

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On 24 February 1996, Basulto scheduled a flight into the Florida Straits, toward Cuba, in search of reported rafters.<sup>182</sup> The flight plans were filed with the FAA and transmitted to Cuba.<sup>183</sup> At approximately 1:15 P.M., three BTTR aircraft departed from the Opa-Locka, Florida, airfield: N2506, carrying Basulto and others; N2456, piloted by Carlos Costa and carrying Pablo Morales; and N5485, piloted by Mario de la Pena and carrying Armando Alejandro.<sup>184</sup> At approximately 3:00 P.M., the planes crossed the 24th parallel, which marks the boundary between the Miami and Havana Flight Information Regions and is in international airspace. At this point, they communicated by radio with Havana Air Traffic Control ("Havana ATC") identifying themselves and their flights.<sup>185</sup> Within minutes of the crossing, Cuban military jet fighter aircraft sighted and pursued Costa's plane in international airspace.<sup>186</sup> At 3:20 P.M., Cuban

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<sup>181</sup> Def. Hernandez Ex. GH, composite 18G.

<sup>182</sup> R83 at 9161-65, 9167-70.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 9168-70; Govt. Exs. 478, 479.

<sup>185</sup> R83 at 9181-83; Govt. Ex. 475A at 2-3.

<sup>186</sup> Govt. Ex. 483 at 8-9.

military ground control radioed that the Cuban aircraft were "authorized to destroy." *Id.* Accordingly, the Cuban military aircraft fired on and destroyed the plane.<sup>187</sup> A few moments later, the Cuban fighter jet sighted the plane piloted by de la Pena and shot it down.<sup>188</sup> The shoot downs of the two BTTR planes were observed both by occupants of a fishing boat and by the crew and passengers onboard a cruise ship.<sup>189</sup> The bodies of the people in the aircraft, three of whom were United States citizens, were never recovered. Both planes were in international airspace, flying away from Cuba, when they were shot down; they had not entered Cuban airspace.<sup>190</sup>

Lieutenant Colonel Roberto Hernandez Caballero, of the Ministry of Cuba Department of State Security, testified that he investigated a number of terrorist acts in Havana and in other locations at Cuban-owned facilities during 1997.<sup>191</sup>

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<sup>187</sup> *Id.* at 10-11.

<sup>188</sup> *Id.* at 14-16.

<sup>189</sup> R53 at 5109-14, 5117-18; Govt. Ex. 483 at 5-7, 11, 13, 17-18, 20. The cruise ship was Royal Caribbean's "Majesty of the Seas" with about 2,600 passengers and 800 crew. R53 at 5084-86. The first officer on the ship explained that they were on the last leg of a weekly cruise about 24 nautical miles off the north coast of Cuba during the shootdowns. *Id.* at 5087-89, 5109-14. A videotape of the shootdowns made by a cruise ship passenger was apparently "played on TV many times." *Id.* at 5124.

<sup>190</sup> R53 at 5113-21, 5131-33; Govt. Exs. 440, 469B, 484.

<sup>191</sup> R93 at 10750-51, 10754-55, 10783-832. The acts included an explosion on 12 April 1997 which destroyed the bathroom and dance floor at the



He advised Medina of the attacks in April and directed that he "[s]earch for active information on [the acts] that [the Cubans with ties to the Cuban American Military Council ('CAMCO')] have, or any attempt for future similar actions [in Cuba] by CAMCO."<sup>192</sup> In September, Hernandez notified the Cuban authorities that he had received information that "one of the two brothers who had something to do with the bomb on [an Italian tourist who was

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discotheque Ache in the Media Cohiba Hotel, *Id.* at 10755, 10757, 10759; a bombing on 25 April 1997 at the Cubanacan offices in Mexico, R97 at 11318-19; the 30 April 1997 explosive device found on the 15th floor of the Cohiba Hotel, R93 at 10766-69, 10771; the 12 July 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies and did significant damage inside the hotels, *Id.* at 10786-88, 10795-801; the 4 August 1997 explosion at the Cohiba Hotel which created a crater in the lobby and destroyed furniture; *Id.* at 10802-05; explosions on 4 September 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant, *Id.* at 10807-09, 10820; and, the discovery of explosive devices at the San Jose Marti International Airport in a tourist van in the taxi dispatch area on 19 October 1997 and underneath a kiosk on 30 October 1997, *Id.* at 10824-30. The explosions on 4 September killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused property damage at all locations. *Id.* at 10809-13, 10815-20, 10822-23.

<sup>192</sup> R97 at 11316-18; Campa Exs. R57(a), R57(b) at 2, 59.

killed]" was available to meet for lunch and that "next week they [the terrorists] would try to place a bomb in one of the largest buildings [associated with tourism] in Cuba which is visited most by [Castro]."<sup>193</sup> Hernandez's contact was instructed to elaborate on the information that he had obtained.<sup>194</sup> As a result of the investigations, Caballero said that the Cuban Department of State Security arrested some individuals, but that he believed some of the individuals responsible for financing, planning, and organizing the explosions lived in the United States and had not been arrested.<sup>195</sup> Caballero explained that, in June 1998, he provided FBI agents with documentation and investigation materials regarding the terrorist acts between 1990 and 1998, and received the FBI's findings in March 1999.<sup>196</sup>

Hernandez worked in the United States from 1994 to 1998, supervising unregistered Cuban agents Juan Roque and Rene Gonzalez who both infiltrated the BTTR organization, and Operation Aeropuerto which was Guerrero's penetration of the NAS. In late 1995 and early 1996, Hernandez participated in a plan to have Roque return to Cuba to undermine the BTTR. He also directed an agent to apply for a job with Southcom,<sup>197</sup> and later supervised Operation

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<sup>193</sup> R97 at 11320-21.

<sup>194</sup> *Id.* at 11321; Campa Ex. R63 at 1.

<sup>195</sup> R93 at 10832, 10839, 10842.

<sup>196</sup> *Id.* at 10839-41; Campa Ex. R-33-MM.

<sup>197</sup> R40 at 3231-32, 3238-40; R46 at 4012-14; Govt. Exs. DG 103 at 3-4, HF 104 at G-3.

Suroc which was the agents' penetration of Southcom.<sup>198</sup> In late January 1996, he received a series of messages from the Cuban government announcing "Operacion Escorpion," which involved confronting the counter-revolutionary efforts of the BTTR in late January 1996.<sup>199</sup> In the messages, Roque and Gonzalez were directed to provide Cuba with specific information through codes regarding the BTTR flying missions; Roque and Gonzalez were advised not to fly on these missions.<sup>200</sup> Hernandez was later recognized for his "decisive" role in Operations Venicia and German, in which "the Miami right [was dealt] a hard blow."<sup>201</sup>

Hernandez also participated in the spread of disinformation. He was asked to mail DI-furnished letters, purporting to be from a "counterrevolutionary" organization which threatened members of Congress who supported lifting the embargo on Cuba in order to provoke the defeat of members of Cuban-American descent.<sup>202</sup> Hernandez suggested a number of projects in south Florida: making threatening phone calls to a newspaper publisher which appeared to come from a

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<sup>198</sup> Govt. Exs. DG 107 at 23-24, DG 108 at 2.

<sup>199</sup> Govt. Ex. HF 115 at G-3.

<sup>200</sup> *Id.*; Govt. Exs. 112 at 10; DG 104 at 2; HF 116 at G-3; HF 120 at G-3, 121 at G-3; HF 122 at G-3; HF 123 at G-3.

<sup>201</sup> Govt. Exs. HF 128-G03; DG 108 at 6, 8; HF 136-G-3. Operations Venicia and German involved Roque's extraction from the United States and return to Cuba to denounce BTTR.

<sup>202</sup> R49 at 4611-12; DG 102 at 42.

CANF supporter; testing BTTR's airplane security for sabotage feasibility; and publishing a book suggesting that BTTR founder Basulto knew in advance that his BTTR followers would be shot down over Cuba.<sup>203</sup> He asked Gonzalez to provide information to M-III<sup>204</sup> about funding for anti-Castro sabotage, disagreements in the Miami-Cuban community about the Pope's visit to Cuba, and disagreements within CANF over its internal leadership succession and future terrorist plans.<sup>205</sup> In August 1998, Hernandez reported to the Cuban government on information that he had learned from a newspaper article that Alpha 66 camp participants, armed with rifles and semiautomatic machine guns, simulated an attack on a Cuban air base, and that an identified individual had claimed to have participated in Cuban hotel bombings in 1992, 1994, and 1995.<sup>206</sup> He also shared the news from the article that Alpha 66 continued to prepare for attacks against Cuba, that some of the group's arsenal was located on an island behind Andrews Air Force Base, and that the group was attempting to obtain C-4 explosives to use during its next attack.<sup>207</sup>

Medina worked with Guerrero and assumed his

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<sup>203</sup> R49 at 4614-16; Govt. Exs. DG 107 at 52; DG 127 at 5; DG 139 at 10-11.

<sup>204</sup> See *supra* note 137.

<sup>205</sup> Govt. Ex. DC 101 at 19-21.

<sup>206</sup> R97 at 11291-93, 11295.

<sup>207</sup> *Id.* at 11294.

supervision from Hernandez in June 1997.<sup>208</sup> He also supervised Operation Suroc and worked with agents who had been recruited by Hernandez to penetrate Southcom.<sup>209</sup> In May 1997, Medina was asked by the DI to gather information regarding infiltrating various local, state, and federal agencies located in Florida, including military bases, the Coast Guard, the Immigration and Naturalization Service ("INS"), and the Federal Bureau of Investigation ("FBI").<sup>210</sup>

At some point, Campa took over supervision of several operations from Hernandez and Medina, including Operation Aeropuerto and Operation Suroc.<sup>211</sup> Campa admitted that he and several of his codefendants worked secretly on behalf of the Cuban government to gather and relay information concerning the activities of numerous local, extremist anti-Castro groups and individuals who had previously conducted terrorist acts against Cuba.<sup>212</sup> He was also directed to work on a number of operations, including Operation Rainbow/Arcoiris,

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<sup>208</sup> Ex. R52 at 4; Govt. Exs. DAV 123 at 47, 49; DG 109 at 17; DG 110 at 1.

<sup>209</sup> R40 at 3231-32, 3238-40; R41 at 3317; R46 at 4012-14; Govt. Exs. DG 108; DS 103 at 2, 4, 11; DG 110.

<sup>210</sup> Govt. Ex. DAV 113 at 1, 3-4.

<sup>211</sup> R49 at 4618-19; R31 at 3; R43 at 3; R51 at 9; R52 at 5-10; R84 at 20-27; R97 at 11242, 11252-53, 11277, 11279; Campa Exs. R22 at 26; R24 at 65, 74; Govt. Exs. DAV 118 at 1-5; DG 108 at 28-29; DG 127 at 7-8; HF 143.

<sup>212</sup> R91 at 10592-93.

Operation Brown/Morena, Operation Fog/Neblina, Operation Paradise/Paraiso, Operation Giron, and others. Operation Rainbow involved filming a meeting between CANF leader Orlando Bosch, Alpha 66 and PUND leader Ruben Dario Lopez and a Cuban agent to plan a shipment of weapons into Cuba for the proposed assassination of Castro; other participants included Campa, Hernandez, and two other Cuban agents.<sup>213</sup> Operation Brown required Campa to keep an eye on Bosch in order to learn his relationships and movements, and the places he frequented.<sup>214</sup> Operation Fog involved Campa and Medina monitoring the activities of Roberto Martin Perez, a member of the board of directions for the CANF, which the Cuban government believed was responsible for two July 1997 hotel bombings.<sup>215</sup> In Operation Paradise, Campa and others, including Rene Gonzalez and other Cuban agents, gathered information on the paramilitary activities of Cuban exile groups operating in the Bahamas, including CANF, Alpha 66, Cuba 21, BTTR, and individuals in those organizations.<sup>216</sup> Operation Giron was an attempt to infiltrate CANF, which involved Medina and later Campa as a temporary replacement for Medina.<sup>217</sup> Some of the unnamed operations included

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<sup>213</sup> R97 at 11253-55; Campa Ex. R24 at 8-9.

<sup>214</sup> R97 at 11268-69; Campa Exs. R22 at 26, R24 at 15-16, 19.

<sup>215</sup> *Id.* at 11263, 11270-71, 11273.

<sup>216</sup> *Id.* at 11274-77; Campa Ex. R24 at 21.

<sup>217</sup> R97 at 11277; Campa Exs. R19 at 11-13, 20-23, R20 at 2-4, R35 at 16, 20.



identifying and videotaping boats in the Miami River, obtaining information concerning Cuban exile paramilitary camps, and surveillance of various anti-Castro persons and groups. In July 1998, Campa and Hernandez, working with other Cuban agents, identified and videotaped two boats in the Miami River which were believed to contain weapons and explosives destined for Cuba.<sup>218</sup> The agents were instructed to consider disabling the boats by burning or damaging them or anonymously notifying the FBI about the boats.<sup>219</sup> Campa and Hernandez also unsuccessfully tried to locate the Comandos L camp F-4, near Clewiston, Florida, with directions provided to them by the Cuban government.<sup>220</sup>

The agents supervised by Campa and Medina operated with a separate small budget requiring approval by the authorities in Cuba, and the officers shared housing to economize.<sup>221</sup> Campa lived in an apartment owned by Hernandez from November 1997 until February 1998, and in an apartment shared with Medina from July until September 1998.<sup>222</sup>

Guerrero was listed as a part of a different operative base which carried out M-V<sup>223</sup> missions,

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<sup>218</sup> R97 at 11284-86, 11289.

<sup>219</sup> *Id.* at 11285, 11288-89.

<sup>220</sup> *Id.* at 11290-91.

<sup>221</sup> Campa Ex. R32 at 2-3; Govt. Exs. DAV 102 at 1; 109 at 1-2, 5-6; 116 at 3, 7; 118 at 2; 124 at 8; 126 at 21; 129 at 3, 59.

<sup>222</sup> R97 at 11277-78; R101 at 11714, 11721-23.

<sup>223</sup> See *supra* note 137.

including those targeting United States military installations.<sup>224</sup> Under Operation Aeropuerto, Guerrero achieved “long-term” penetration of the NAS through his employment in the Public Works Department in 1993. He was employed in maintaining the sewage lift-off stations and had access to many areas of the NAS.<sup>225</sup> Although he executed several United States loyalty affidavits as conditions of that employment, he was also fulfilling a DI work plan to obtain military information, to conduct visual intelligence of the NAS, and to search for operational resources.<sup>226</sup>

Guerrero delivered frequent detailed reports to Campa, Hernandez, and Medina regarding the deployment of United States military assets at the NAS from 1994 through 1997.<sup>227</sup>

Gonzalez worked in a number of operations and “active measures.” He was furnished with proposed text for anonymous letters and telephone calls by Hernandez and was directed to consider ways to harass and cause dissension among the counter-revolutionary organizations by disseminating rumors that Basulto was disparaging various members.<sup>228</sup> Gonzalez was directed to study BTTR’s airplane

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<sup>224</sup> Govt. Exs. DAV 102 at 1; 129 at 62.

<sup>225</sup> R74 at 7918; Govt. Ex. DG 120 at 2-3.

<sup>226</sup> R74 at 7959; Govt. Ex. 122 at 5-8, 10.

<sup>227</sup> Govt. Exs. DAV 101 at 9-28; DAV 102 at 17-29; DG 121; DL 102 at 11; DG 141 at 19.

<sup>228</sup> R49 at 4583-91, 4598-604, 4612-13; R60 at 6277-83; Govt. Ex. DC 101 at 11-19, 701, 701A, 702.

hangar, to consider burning down its warehouse and spreading rumors that BTTR had burned the warehouse for insurance money, to disable BTTR equipment and antennae, and to threaten a United States government agent with execution and send him a book bomb-appearing device.<sup>229</sup>

Gonzalez was also instructed to act as an FBI informant.<sup>230</sup> Shortly after the BTTR shutdown, Gonzalez told his FBI contact that he felt betrayed by Roque.<sup>231</sup> After the disks found in the Avispa officers' apartments were decrypted, the FBI again approached Gonzalez based on his BTTR association; Hernandez warned Gonzalez to act torn between his opposition to terrorism and his loyalty to the anti-Castro "brothers" and not to act like a "Castro agent."<sup>232</sup> Gonzalez reported that he had told the FBI that ethically he could not inform on the BTTR, but assured the FBI that he would contact its agents if he learned of anything that would affect United States security.<sup>233</sup>

During the trial, the government described the Cuban intelligence operations as "an intelligence pyramid" headed by Fidel Castro.<sup>234</sup> It suggested that

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<sup>229</sup> Govt. Ex. DHo101 at 2-6.

<sup>230</sup> Govt. Exs. HF 105 at G-3, 125 at G-3.

<sup>231</sup> R69 at 7044, 7077-78.

<sup>232</sup> Govt. Ex. DG-107 at 58-60

<sup>233</sup> *Id.* at 65-67.

<sup>234</sup> R44 at 3699-700. The U.S. Attorney asked government witness Stuart Hoyt to describe the structure of the Cuban intelligence system by questioning "who is at the top of the Cuban

the Cuban government applied the "penalty" of death for throwing things out of airplane windows,<sup>235</sup> and was "repressive"<sup>236</sup> and a "dictatorship".<sup>237</sup>

### *G. Closing Arguments*

During closing arguments, the government commented that Hernandez's attorney had called the shootdown "the final solution" and noted that such terminology had been "heard ... before in the history of mankind."<sup>238</sup> It argued that the defendants had voluntarily joined "a hostile intelligence bureau" that saw "the United States as its prime and main

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intelligence system." R44 at 3699. Hoyt responded by stating that "Fidel Castro" was at the top as "Commander-in-Chief", "[P]resident", "Council Minister", and "head of the Cuban Communist Party." *Id.*

<sup>235</sup> R73 at 7806-07.

<sup>236</sup> R80 at 8748. After a defense witness explained on cross-examination that the tone of the dissenters within Cuba was "more respectful" than that of Cuban exile organizations located outside of Cuba, the government attorney asked whether such an answer was relevant when it was a "[p]articularly repressive government." R80 at 8748. Later, after the witness stated that, if he had been a dictator, he would have tried to stop the BTTR flight, the government attorney questioned whether "[w]e live in a dictatorship." *Id.* at 8754. After the witness replied "Fortunately we don't," the government attorney commented, "And people do have that freedom of choice." *Id.*

<sup>237</sup> *Id.* at 8754.

<sup>238</sup> R124 at 14474.

enemy.”<sup>239</sup> It stated that “the Cuban government” had a “huge” stake in the outcome of the case, and that the jurors would be abandoning their community unless they convicted the “Cuban sp[ies] sent to ... destroy the United States.”<sup>240</sup> It maintained that the Cuban government sponsored “book bombs,” “telephone threats of car bombs,” and “sabotage,” and “killed four innocent people.”<sup>241</sup> It suggested that the Cuban government used “goon squads” to torture its critics.<sup>242</sup> It asserted that the Cuban government had their agents falsify their identities by using the identification of “dead babies” and “stealing the memories of families.”<sup>243</sup> It argued that the defendants were “bent on destroying the United States” and were “paid for by the American taxpayer.”<sup>244</sup> It contended that the defense argument that the agents were in the United States to keep an eye on the Cuban exile groups was false because they were on United States military bases, spying on United States military, the FBI, and Congress.<sup>245</sup> The government implied that the government of Cuba was not cooperating with the FBI.<sup>246</sup> It commented that Cuba “was not alone” in shooting down civilian

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<sup>239</sup> *Id.* at 14475.

<sup>240</sup> *Id.* at 14532, 14481.

<sup>241</sup> *Id.* at 14480.

<sup>242</sup> *Id.* at 14495.

<sup>243</sup> *Id.* at 14480-81.

<sup>244</sup> *Id.* at 14482.

<sup>245</sup> *Id.* at 14483-85, 14488.

<sup>246</sup> *Id.* at 14493.

aircraft as they “are friends with our enemies,” including “the Chinese and the Russians,” and compared the BTTR shootdown to the 1986 Libyan shootdown of a civilian aircraft.<sup>247</sup> It maintained that the government of Cuba did not care about the occupants of the planes, and shot down the planes even though they could have forced Basulto’s plane to land.<sup>248</sup> It argued that Cuba was a “repressive regime [that] doesn’t believe in any [human] rights.”<sup>249</sup> It summarized that the defendants had joined an “intelligence bureau ... that sees the United States of America as its prime and main enemy” and that the jury was “not operating under the rule of Cuba, thank God.”<sup>250</sup>

Campa and Hernandez’s objections throughout the closing arguments were sustained.<sup>251</sup> The jury was subsequently instructed to consider only the evidence admitted during the trial, and to remember that the lawyers’ comments were not evidence.<sup>252</sup>

#### *H. Jury Conduct and Concerns During the Trial*

Five months into the trial, when one seated juror had a conflict, the court discussed the possibility of removing a juror who had a two-day conflict and seating one of the alternates.<sup>253</sup> Hernandez’s attorney

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<sup>247</sup> *Id.* at 14512-13.

<sup>248</sup> *Id.* at 14513.

<sup>249</sup> *Id.* at 14519.

<sup>250</sup> *Id.* at 14475.

<sup>251</sup> *Id.* at 14482, 14483, 14493.

<sup>252</sup> R125 at 14583.

<sup>253</sup> R104 at 12091-92.



requested a recess, arguing that the parties and the court had worked very hard to select "a jury we are very happy with" and, with Gonzalez, Guerrero, and Medina's attorneys, maintained that it would be unreasonable to refuse to accommodate the juror after her length of service and her request to complete the trial.<sup>254</sup> The district court granted the recess.<sup>255</sup>

In early February 2001, a small protest related to the trial was held outside of the courthouse, but the jury was protected from contact with the protestors and from exposure to the demonstration.<sup>256</sup> On 13 March 2001, the court noted that the day before, cameras were focused on the jurors as they left the building.<sup>257</sup> Despite the court's arrangements to prevent exposure to the media, jurors were again filmed entering and leaving the courthouse during the deliberations and that footage was televised.<sup>258</sup> Some of the jurors indicated that they felt pressured; therefore, the district court again modified the jurors' entry and their exit from the courthouse and transportation.<sup>259</sup>

For deliberations, the jury was moved to another

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<sup>254</sup> *Id.* at 12091-94.

<sup>255</sup> *Id.* at 12094-95.

<sup>256</sup> R59 at 6096-108, 6145-49. The 20 protestors carried signs stating "take Castro down," "[f]air trial wanted," and "spies to be killed." *Id.* at 6145.

<sup>257</sup> R81 at 9005.

<sup>258</sup> R126 at 14644-47.

<sup>259</sup> *Id.* at 14645-47.

floor of the courthouse with controlled access.<sup>260</sup> During the deliberations, members of the jury were filmed entering and leaving the courthouse, and the media requested the names of the jurors.<sup>261</sup> The jurors expressed concern that they were filmed “all the way to their cars and [that] their license plates had been filmed.”<sup>262</sup> To protect the jurors’ privacy, the district court arranged for the jurors to come into the courthouse by private entrance and provided them with transportation to their vehicles or to mass transit.<sup>263</sup> The jury spent five days in deliberations and, during that period of time, asked for and was given a comprehensive list of all of the admitted evidence.<sup>264</sup>

### *I. Motions for New Trial*

In late July and early August 2001, following the trial, Campa, Gonzalez, Guerrero, and Medina moved for a new trial and renewed their motions for a change of venue, arguing that their fears of presumed prejudice remained despite the district court’s efforts during *voir dire*.<sup>265</sup> Campa asserted that the jury’s failure to ask questions and its quick verdicts in the complex, almost seven-month trial suggested that it

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<sup>260</sup> R124 at 14546-47; R125 at 14624.

<sup>261</sup> R126 at 14643-46.

<sup>262</sup> *Id.* at 14644-45.

<sup>263</sup> *Id.* at 14645-47.

<sup>264</sup> R125 at 14625; R126 at 14640-43.

<sup>265</sup> R12-1338 at 2-3; R12-1342 at 2-3; R12-1343 at 1-4; R12-1347 at 1-2.

was subject to community pressure and prejudice.<sup>266</sup> Campa and Gonzalez also maintained that the jury was unduly prejudiced by the remarks of witness Jose Basulto. According to Campa and Gonzalez, Basulto's testimony implied that Hernandez's counsel was "either a spy, a representative of the Cuban Government, a communist, or in the employ of the Cuban intelligence service."<sup>267</sup> The district court denied the motions for new trial. It referenced its prior orders denying a change of venue and denying reconsideration of the denial of the change of venue, and stated that because it was "[a]ware of the impassioned Cuban exile-community residing within this venue, the Court implemented a series of measures to guarantee the Defendants' right to a fair trial."<sup>268</sup> The court concluded that "any potential for prejudice was cured" "through the Court's methodical, active pursuit of a fair trial from voir dire ... to ... the return of verdict."<sup>269</sup>

In December 2001, Guerrero, Hernandez, and Medina were sentenced to life, Campa was sentenced to 228 months, and Gonzalez was sentenced to 15 years.<sup>270</sup>

In November 2002, Guerrero renewed his motion for a new trial based on newly discovered evidence; the motion was adopted by Campa, Gonzalez,

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<sup>266</sup> R12-1343 at 1-3.

<sup>267</sup> R12-1342 at 3; R12-1343 at 3-4.

<sup>268</sup> R13-1392 at 14.

<sup>269</sup> *Id.* at 15.

<sup>270</sup> R14-1430, 1435, 1437, 1439, 1445.

Hernandez, and Medina.<sup>271</sup> Guerrero argued that a new trial was warranted because of "misrepresentations of fact and law made by the United States Attorney in opposing the ... motion for change of venue" and submitted an appendix to support his argument.<sup>272</sup> He also argued that the government's position regarding change of venue was contradicted by its position in a motion for change of venue which the government filed in *Ramirez v. Ashcroft*, No. 01-4835-Civ-Huck (S.D.Fla. 25 June 2002).

In *Ramirez*, the plaintiff, a Hispanic employed by the INS, alleged a hostile work environment, unlawful retaliation, and intimidation from his non-Hispanic fellow employees' hostility resulting from

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<sup>271</sup> R15-1635, 1638, 1644, 1647, 1650, 1651. The National Jury Project, the National Lawyers Guild, the International Association of Democratic Lawyers sought and were granted leave to file briefs as *amicus curiae* in support of this motion. R15-1640, 1653, 1654, 1655, 1677.

<sup>272</sup> R15-1635 at 1, 1636. On appeal, Hernandez mentions that the government also made other misrepresentations related to this case in a petition for writ of prohibition and motion to stay in another case filed in this court, *In re United States of America*, No. 01-12887 (11th Cir. May 25, 2001) regarding the district court's rulings in this case. The district judge commented on both statements made by the government and alleged by Hernandez to be misrepresentations, calling one "an outright misrepresentation of fact" and another an "erroneous statement" and "gross misrepresentation[.]" R121 at 13918, 14025.

the INS's 22 April 2000 removal of Elian Gonzalez from the United States and his return to his father in Cuba.<sup>273</sup> Within the *Ramirez* motion for change of venue, the government noted that

[T]he Elian Gonzalez matter was an incident which highly aroused the passions of the community and resulted in numerous demonstrations ....

5. While the Elian Gonzalez affair has received national attention[,] the exposure in Miami-Dade County has been continuous and pervasive. Indeed, even now, more than a year after the return of Elian to his father [in April 2000], there continues to be extensive publicity ... which will arouse and inflame the passions of the Miami-Dade community.

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8. Historically, media articles relating to Elian Gonzalez and the handling of his return to his father have persisted from November 1999 to the present [June 2002].<sup>274</sup>

The government argued that

[i]t cannot be disputed that the return of Elian Gonzalez to his father in Cuba created a serious rift in this community, a rift which continues to the present. This rift exists not only between Hispanics and non-Hispanics,

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<sup>273</sup> R15-1636, Ex. 2 at 1-2.

<sup>274</sup> *Id.* 2-3, 11.

but also between Cubans a[n]d non-Cubans and within the Cuban community itself. It is beyond dispute that virtually every person in Miami-Dade county [sic] has a strong opinion, one way or another, regarding the INS and the U.S. Attorney General's Office, and the manner in which the Elian Gonzalez matter was handled. The effect of the media coverage ... serves to foment and revive these feelings on an ongoing basis .... As such the media accounts cannot do anything other than create the general state of mind where the inhabitants of Miami-Dade County are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the instant case solely on the evidence presented in the courtroom .... Under such circumstances and strongly held emotions, and in light of the media coverage ..., it will be virtually impossible to ensure that the defendants will receive a fair trial if the trial is held in Miami-Dade County.<sup>275</sup>

The government requested "a change in the location/venue" "outside of Miami Dade County to ensure that the Defendant ... receive a fair and impartial trial on the merits of the case."<sup>276</sup> They noted that, "[w]hile not requested," the court also had the discretion to transfer the trial to another judicial

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<sup>275</sup> *Id.* at 14-15.

<sup>276</sup> *Id.* at 17, 16.



district.<sup>277</sup> The government orally argued that there were no incidents “since 1985 that so polarized the community. That so affected every individual in the community as the Elian Gonzalez affair.”<sup>278</sup> When the district court asked whether a transfer of the case to the Fort Lauderdale division courthouse would be sufficient, the government responded that “[t]he demonstrations occurred in Miami. They are predominantly conducted by citizens of Miami Dade county [sic]. As you move the case out of Miami Dade you have less likelihood there are going to be deep-seated feelings and deep-seated prejudices in the case.”<sup>279</sup>

The appendix filed in support of the motion for new trial included an affidavit by Professor Moran, news articles, and reports by Human Rights Watch regarding threats to the freedom of expression within the Miami Cuban exile community.<sup>280</sup> Moran stated that he had previously had contact with the district judge in an earlier, unrelated litigation in which she had “excoriated” him for interviewing jurors after a trial and threatened the attorneys who had retained him.<sup>281</sup> Guerrero included a letter from Moran to the district court in which he offered “assist[ance]” to the district court “regarding (change of venue)

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<sup>277</sup> *Id.* at 16 n. 1.

<sup>278</sup> R15-1636, Ex. 3 at 24.

<sup>279</sup> *Id.* at 25.

<sup>280</sup> R15-1636, Exs. 7-10, 12.

<sup>281</sup> R15-1636, Ex. 7 at 7.

surveys.”<sup>282</sup> In Moran’s affidavit, he explained that he did not provide a copy of his letter to the district judge to Guerrero’s counsel because he was upset that he was not timely paid for his work by the district court.<sup>283</sup> The news articles addressed the numerous incidents of violence and threats by anti-Cubans in the decade preceding the trial.<sup>284</sup> The

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<sup>282</sup> R15-1636, Ex. 1 at 1.

<sup>283</sup> R15-1636 at 4-7.

<sup>284</sup> Jim Mullin, *Frank Talk About Free Speech*, MIAMI NEW TIMES, May 25, 2000, R15-1636, Ex. 9 (“The reason that the issues related to Cuba are the hot-button issues ... is that we can’t escape the fact that in this town there are 700,000 Cuban Americans. There are 10,000 people in this town who had a relative murdered by Fidel Castro. There are 50,000 people in this town who’ve had a relative tortured by Fidel Castro. There are thousands of former political prisoners in this town. For these people and for the 500,000 Cuban Americans who are old enough to remember having to leave their homeland, the issues related to Fidel Castro are not a historical note; they are living, breathing wounds.”); Jim Mullin, *The Burden of a Violent History*, MIAMI NEW TIMES, Apr. 20, 2000, R15-1636, Ex. 10 (“Lawless violence and intimidation have been hallmarks of el exilio for more than 30 years. Given that fact, it’s not only understandable many people would be deeply worried, it’s prudent to be worried.”).

We also take judicial notice of an editorial: Luis Botifol, *The Cuban Spies’ Case vs. Credibility of the U.S. Judiciary*, MIAMI HERALD, May 16, 2001 at 9B (“[T]he media’s reports generate unfavorable comments in the [Cuban exile] community, which attributes the judge’s permissiveness as stemming from an association with prominent members of the past administration who don’t sympathize with the exile community .... [T]he defense surely has received ample cooperation from the Castro regime .... [T]he judge has permitted the defense a broad investigation ... [T]rials like this

Human Rights Watch reports covered harassment and intimidation suffered by Miami Cuban exiles in expressing moderate political views as to Cuban relations or Fidel Castro's government.<sup>285</sup> The motion for new trial was also supported by a public opinion survey conducted by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez.<sup>286</sup> By affidavit, Dr. Brennan characterized the results of a poll of Miami Cuban-Americans as reflecting "an attitude of a state of war ... against Cuba."<sup>287</sup> She reviewed Moran's survey and stated that it "accurately reflects profound existing bias against those associated with the Cuban government in

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one diminish the trust and credibility of the judiciary upon which our democracy rests."). Hernandez's Br., App. F.

<sup>285</sup> Americas Watch/The Fund for Free Expression/Divisions of Human Rights Watch, *Dangerous Dialogue/Attacks on Freedom of Expression in Miami's Cuban Exile Community*, Aug. 1992, R15-1636, Ex. 12 ("Miami's Cuban exile community ... has long been dominated by fiercely anti-Communist forces who are strongly opposed to contrary viewpoints, even if-especially if-expressed simply in terms of the desirability of a dialogue with, or opening to, the Castro regime."); Human Rights Watch/Americas Human Rights Watch Free Expression Project, *United States Dangerous Dialogue/Threats to Freedom of Expression Continue in Miami's Cuban Exile Community*, Nov. 1994, R15-1636, Ex. 8.

<sup>286</sup> R15-1636, Exs. 4, 5.

<sup>287</sup> R15-1636, Ex. 4 at 1, 3.

Miami [-]Dade County" where "[p]otential jurors ... would be impervious to traditional methods of detecting and curing bias through voir dire and court instruction."<sup>288</sup> Brennan determined that, although 49.7 percent of the local Cuban population strongly favored direct United States military action to overthrow the Castro regime, only 26 percent of the local non-Cuban population and 8.1 percent of the national population favored such action.<sup>289</sup> Similarly, 55.8 percent of the local Cuban population strongly favored military action by the exile community to overthrow the Cuban government but only 27.6 percent of the local non-Cuban population and 5.8 percent of the national population favored such action.<sup>290</sup> She concluded that there was "an attitude of a state of war between the local Cuban community against Cuba" which had "spilled over to the rest of the community" and had a "substantial impact on the rest of the Miami-Dade community."<sup>291</sup> She found that the documented community bias showed a "deeply entrenched body of opinions [so entrenched as to often not be consciously held] that would hinder any jury in Miami-Dade County from reaching a fair and impartial decision in this case."<sup>292</sup>

Dr. Pérez concluded that "the possibility of selecting twelve citizens of Miami-Dade County who

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<sup>288</sup> *Id.* at 8.

<sup>289</sup> *Id.* at 3.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 7.

can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero ... even if the jury were composed entirely of non-Cubans, as it was in this case.”<sup>293</sup> His conclusion was based on a number of factors, including the demographics of the area and the cohesiveness, political impact, interests, and emotional concerns of the Cuban community. Specifically, he noted that “persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in the venue group in Miami-Dade County, comprising two out every seven residents.”<sup>294</sup> He explained that the Cubans created a “true ethnic enclave” which exercised strong economic and political influence within the Miami-Dade County community as evidenced by the establishment of major institutions such as the Cuban American National Foundation, the Hispanic Builders Association, the Latin Chamber of Commerce, and the Latin Builders Association and the election of numerous Cuban-American public officials including the Miami mayor, city and county managers, city commissioners, state legislators, members of the United States Congress, mayors and city commissioners and councilpersons in other local cities and towns, and leaders at local universities.<sup>295</sup> The Cuban community’s “most overriding concern: the ongoing struggle for the recovery of their homeland” had been “injected” into the Miami-Dade County community to the extent

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<sup>293</sup> R15-1636, Ex. 5 at 2-3.

<sup>294</sup> *Id.* at 3-4.

<sup>295</sup> *Id.* at 6-7.

that it took “center stage.”<sup>296</sup> Pérez stated that the issue was characterized by an “uncompromising hostility towards the Cuban government” and included an intolerance toward opposing views which brought economic, political, social pressure on the dissenting individual or group.<sup>297</sup> He reported that “[t]here was a long history of threats, bomb scares, actual bombings and even murders directed at” individuals and groups perceived to have a “softness” toward Castro’s regime.<sup>298</sup> He also noted that, while many Cubans and non-Cubans had expressed dissenting views on the fate of Elian Gonzalez and on the United States policy toward Cuba, the defendants’ case concerned “[t]he 1996 shutdown [which] was uniformly repudiated in Miami” and thus approached a “taboo, a position that no one would want to take, or even appear to take.”<sup>299</sup>

The district court denied the motion, stating that “the situation in *Ramirez* differed from the facts of this case in numerous ways” because it “related directly to the INS’s handling of the removal of Elian Gonzalez from his uncle’s home, an event which, it is arguable, garnered more attention here in Miami and worldwide.”<sup>300</sup> Also, the district court noted that the government’s position in *Ramirez* “was premised specifically upon the facts of that case, including that

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<sup>296</sup> *Id.* at 7.

<sup>297</sup> *Id.* at 8.

<sup>298</sup> *Id.* at 8-9.

<sup>299</sup> *Id.* at 12-13.

<sup>300</sup> R15-1678 at 8-9.



the plaintiff had ... stirred up extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit.”<sup>301</sup> It concluded that the government’s arguments “in *Ramirez* do not in any way demonstrate prosecutorial misconduct in the instant case.”<sup>302</sup> The district court did not consider the “interests of justice” issue and thus declined to consider any of the exhibits submitted in support of this argument, including Dr. Brennan’s survey and conclusions and Dr. Pérez’s study.<sup>303</sup>

## II. DISCUSSION

On appeal, Campa, Gonzalez, Guerrero, Hernandez, and Medina argue that the district court’s denial of their motions for change of venue violated Federal Rule of Criminal Procedure 21(a), denied them a fair trial, and undermined the reliability of the verdicts.<sup>304</sup> They contend that the district court ignored the unique confluence of demographics, politics, and culture in the Miami community, the strong anti-Castro sentiment in that community, and the history of violence within the Cuban-exile community. They maintain that a new trial was warranted because of the government’s use

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<sup>301</sup> *Id.* at 9.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 6 n. 3.

<sup>304</sup> The change of venue issue was briefed by Guerrero and Campa, and adopted by Gonzalez, Hernandez, and Medina. Campa also adopted the argument presented by Guerrero, while Guerrero adopted the argument presented by Campa on this issue.

of inflammatory statements during closing arguments.<sup>305</sup> Campa, Gonzalez, Guerrero, Hernandez, and Medina contend that the district court abused its discretion in denying the motion for new trial and change of venue because it failed to properly consider the newly discovered evidence which supported the argument that the defendants were unable to receive a fair trial before an impartial jury in Miami.<sup>306</sup> They posit that the district court abused its discretion by denying the requests for an evidentiary hearing to present additional evidence regarding irregularities with expert witness Moran.

#### *A. Denial of Motion for Change of Venue*

We conduct a multi-level review on the denial of a motion for change of venue. We review the district court's interpretation of the Federal Rules of Criminal Procedure *de novo*, see *United States v. Noel*, 231 F.3d 833, 836 (11th Cir.2000) (per curiam), and application of Rule 21(a) for abuse of discretion, see *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir.1975).<sup>307</sup> However, "[w]hen a criminal

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<sup>305</sup> The issue addressing prosecutorial misconduct during closing arguments was addressed by Hernandez and Campa, and adopted by Guerrero and Medina. Campa also adopted the arguments presented by Hernandez on this issue.

<sup>306</sup> The National Lawyers Guild also filed an amicus curiae brief on the motion for new trial based on newly discovered evidence.

<sup>307</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to 1 October 1981.

defendant alleges that pretrial publicity precluded a trial consistent with the standards of due process," we are bound to "undertake an independent evaluation of the facts established in support of such an allegation." *Id.*

"A fair trial in a fair tribunal is a basic requirement of due process," requiring not only "an absence of actual bias," but also an effort to "prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); see also *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) ("Due process requires that the accused receive a fair trial by an impartial jury free from outside influences."). A juror's verdict "must be based upon the evidence developed at the trial" "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

A federal criminal defendant's motion for change of venue based on prejudice is governed by Federal Rule of Criminal Procedure 21. Upon such a motion,

the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Fed.R.Crim.P. 21(a).<sup>308</sup> Our review of the denial of a change of venue motion is guided by a due process analysis. See *United States v. Fuentes-Coba*, 738 F.2d 1191, 1194 (11th Cir.1984).

When the jurors are to be drawn from a community which is "already permeated with hostility toward a defendant," whether that hostility is a result of prejudicial publicity or other reasons, the court should examine the various methods available to assure an impartial jury. *Groppi v. Wisconsin*, 400 U.S. 505, 509-10, 91 S.Ct. 490, 493, 27 L.Ed.2d 571 (1971). Those methods include granting a continuance to allow "the fires of prejudice [to] cool," the exercise of peremptory and for cause challenges to the venire to exclude jurors who exhibit

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<sup>308</sup> The 1966 Amendments eliminated earlier versions of Rule 21 which referenced transfers to "divisions" and clarified that "[t]ransfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial" under Rule 18. See Fed.R.Crim.P. 21 advisory committee's note. Under Rule 18, "[t]he court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice." Fed.R.Crim.P. 18. The 1966 Amendments vested the district court with "discretion ... to fix the place of trial at any place within the district .... If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where prejudice does not exist." Fed.R.Crim.P. 18 advisory committee's note.

At the change of venue motion hearing, the defendants agreed that a transfer to the Fort Lauderdale division office would be acceptable.

the prejudices of their communities, and granting a change of venue when the community has been repeatedly and deeply exposed to prejudicial publicity. *See Id.* at 510, 91 S.Ct. at 493.

While a change of venue or a continuance should be granted when prejudicial pretrial publicity threatens to prevent a fair trial, a new trial should be ordered if publicity during the proceedings threatens the fairness of the trial. *See Sheppard*, 384 U.S. at 363, 86 S.Ct. at 1522. A fair trial is denied when a court refuses to grant a request for change of venue despite pretrial publicity and pervasive community exposure to the crime causes a trial to be a "hollow formality." *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). To ensure that a defendant will "be tried in an atmosphere undisturbed by ... a wave of public passion," *Irvin*, 366 U.S. at 728, 81 S.Ct. at 1645, a court is required, upon a criminal defendant's motion, to transfer the proceedings "if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial." Fed.R.Crim.P. 21(a). It is unnecessary to determine whether prejudice is disclosed during voir dire if the evidence reflects a "generally hostile atmosphere of the community" which causes the jurors to "inherently suspect circumstances of ... prejudice against a particular defendant." *Pamplin v. Mason*, 364 F.2d 1, 6, 7 (5th Cir.1966). Further, where community hostility is prevalent, "[i]t is unnecessary to prove that local prejudice actually entered the jury box." *Id.* at 6. If community sentiment is strong, courts should place "emphasis on the feeling in the community rather

than the transcript of voir dire" which may not "reveal the shades of prejudice that may influence a verdict." *Id.* at 7; see also *Williams*, 523 F.2d at 1209 n. 10 (stating that although voir dire examination results "are an important factor in gauging the depth of community prejudice, continual protestations of impartiality ... are best met with a healthy skepticism from the bench").

In *Irvin*, the Supreme Court held that a defendant was entitled to a change of venue even though each individual juror had specifically claimed the capacity to be fair and impartial. It noted:

No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such as statement of impartiality can be given little weight.

*Irvin*, 366 U.S. at 728, 81 S.Ct. at 1645. "Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Pamplin*, 364 F.2d at 5. Mindful that the first and best judge of community sentiment and juror indifference is the trial judge, an appellate court should "interfere only upon a showing of manifest probability of prejudice." *Bishop v. Wainwright*, 511 F.2d 664, 666 (5th Cir.1975).

Presumed prejudice has been found "where prejudicial publicity so poisoned the proceedings that



it was impossible for the accused to receive a fair trial by an impartial jury ... and the press saturated the community with ... accounts of the crime and court proceedings." *United States v. Capo*, 595 F.2d 1086, 1090 (5th Cir.1979). Factors to be considered in determining prejudice include the extent of the dissemination of the publicity, the character of that publicity, the proximity of the publicity to the trial, and the familiarity of the jury with the charged crime.<sup>309</sup> See *Williams*, 523 F.2d at 1209-10. Presumed prejudice may be rebutted where the jury is shown to be capable of sitting impartially. See *Knight v. Dugger*, 863 F.2d 705, 707, 723 (11th Cir.1988); *Coleman v. Kemp*, 778 F.2d 1487, 1542 n. 25 (11th Cir.1985).

If a movant "adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually

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<sup>309</sup> We also note that the American Bar Association recommends that a court's determination of a change of venue motion based on "dissemination of potentially prejudicial material" be based on "such evidence as qualified public opinion surveys or opinion testimony by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved." *ABA Standards for Criminal Justice: Fair Trial and Free Press*, 8-3.3(b) (1992). Where there is a substantial likelihood of prejudice from such publicity, Standard 8-3.3 also instructs: (1) that "[a] showing of actual prejudice" is not required; (2) the selection of an acceptable jury is not controlling; and (3) "the failure to exercise all available peremptory challenges" is not a waiver. *Id.* at 8-3.3(b), (c), and (d).

impossible a fair trial by an impartial jury drawn from that community, jury prejudice is presumed and there is no further duty to establish bias." *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980) (citation and internal quotations omitted). Although such presumed prejudice is only rarely applied, the successful movant need not show that the jury was actually prejudiced by the pervasive community sentiment or that the jurors were actually exposed to any publicity, but must show that, first, "the pretrial publicity was sufficiently prejudicial and inflammatory and second that the prejudicial pretrial publicity saturated the community where the trial was held." *Spivey v. Head*, 207 F.3d 1263, 1270 (11th Cir.2000); *Mayola*, 623 F.2d at 997. The movant bears the extremely heavy burden of proving that the pretrial publicity deprived him of his right to a fair trial. See *Coleman*, 778 F.2d at 1489, 1537. Just as issues involving prejudice from publicity require a review of the "special facts" of each case, *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) (per curiam), a review of presumed prejudice requires a review of the totality of the circumstances. See *Murphy v. Florida*, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975). Further, a court considering a change of venue motion must review all of the circumstances and events occurring before and during the trial and their cumulative effect. See *Williams*, 523 F.2d at 1206 n. 7.

One of the matters to consider in reviewing the totality of the circumstances is an extensive voir dire. See *Patton v. Yount*, 467 U.S. 1025, 1029, 1034, 104 S.Ct. 2885, 2888, 2890, 81 L.Ed.2d 847 (1984);

*Jordan v. Lippman*, 763 F.2d 1265, 1276 (11th Cir.1985) (noting "the fundamental importance of voir dire as a tool for insuring the right to an impartial jury"). Presumed prejudice can be shown through admitted prejudice or the demeanor and credibility of the venire. See *Patton*, 467 U.S. at 1029, 1038, 104 S.Ct. at 2888, 2892.

Where, however, the court reviewed an extensive public opinion survey of potential jurors and a purported jury prejudice expert's analysis of media coverage, where a thorough voir dire was conducted by the court and counsel, and where the jury panel was accepted by counsel without the renewal of a motion for change of venue, a defendant's rights were held to be sufficiently safeguarded. See *Fuentes-Coba*, 738 F.2d at 1194-95. Further, the presumption of prejudice was not found where, although "virtually every venireperson and actual juror had heard or read accounts of the case," only a few of the venirepersons indicated a preconceived opinion about the defendant's guilt or innocence, the venirepersons with preconceived opinions who did not believe that they could set their opinions aside were excused for cause, and the extensive publicity was neither inflammatory nor pervasive. *Ross v. Hopper*, 716 F.2d 1528, 1541 (11th Cir.1983). If a party fails to demonstrate either actual or pervasive community prejudice, the absence of juror prejudice may also be indicated by the failure of a party to use all of its allotted peremptory challenges. See *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985); *Dobbert v. Florida*, 432 U.S. 282, 303-04, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977). Further, a lack of juror prejudice can be

presumed when a defendant fails to challenge the district court's voir dire or move for a change of venue after the voir dire. See *United States v. Yousef*, 327 F.3d 56, 90 (2d Cir.2003). In assessing a change of venue request based on pretrial publicity, the existence of overwhelming evidence of guilt is not dispositive. See *Coleman*, 778 F.2d at 1541.

Despite the district court's numerous efforts to ensure an impartial jury in this case, we find that empaneling such a jury in this community was an unreasonable probability because of pervasive community prejudice. The entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami. Waves of public passion, as evidenced by the public opinion polls and multitudinous newspaper articles submitted with the motions for change of venue-some of which focused on the defendants in this case and the government for whom they worked, but others which focused on relationships between the United States and Cuba-flooded Miami both before and during this trial.<sup>310</sup> The trial required consideration of the BTTR shutdown and the martyrdom of those persons on the flights. During the trial, there were both "commemorative flights" and public ceremonies to mark the anniversary of the shutdown. Moreover, the Elian Gonzalez matter, which was ongoing at the time of the change of venue motion, concerned these

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<sup>310</sup> Without determining the validity of Professor Moran's poll, we note that the district court approved the expenditures related to the poll, including the size of the statistical sample.

relationships between the United States and Cuba and necessarily raised the community's awareness of the concerns of the Cuban exile community. It is uncontested that the publicity concerning Elian Gonzalez continued during the trial, "arousing and inflaming" passions within the Miami-Dade community. Despite the district court's thorough and extensive voir dire and its many efforts aimed at protecting the jurors' privacy, voir dire highlighted the community's awareness of this case and also of that of Elian Gonzalez. In this instance, there was no reasonable means of assuring a fair trial by the use of a continuance or voir dire; thus, a change of venue was required. The evidence at trial validated the media's publicity regarding the "Spies Among Us" by disclosing the clandestine activities of not only the defendants, but also of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area. The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable. Further, the government witness's reference to a defense counsel's allegiance with Castro and the government's arguments regarding the evils of Cuba and Cuba's threat to the sanctity of American life only served to add fuel to the inflamed community passions.

#### *B. Denial of New Trial*

We review a district court's denial of a motion for new trial for abuse of discretion. *See United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir.1998). A district court is authorized to grant a new trial "if the interests of justice so require" in extraordinary circumstances and, if the motion is based on newly discovered evidence, if a motion for new trial is filed

within three years of the verdict. See Fed.R.Crim.P. 33(a) and (b)(1) (2002).<sup>311</sup> Newly discovered evidence must satisfy a five-part test: (1) the evidence was newly discovered after the trial; (2) the movant shows due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to issues before the court; and (5) the evidence is of such a nature that a new trial would reasonably produce a new result. See *United States v. DiBernardo*, 880 F.2d 1216, 1224 (11th Cir.1989). The newly discovered evidence is not limited to just the question of the defendant's innocence, but can include other issues of law, See *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir.1978) (per curiam), including questions of the fairness of the trial. See *United States v. Williams*, 613 F.2d 573, 575 (5th Cir.1980). Consideration of a motion for new trial based on newly discovered evidence can also include a review of evidence obtained post-trial. See *United States v. Devila*, 216 F.3d 1009, 1013, 1017 (11th Cir.2000) (per curiam), *vacated in part on other grounds*, 242 F.3d 995, 996 (2001).

The grant of a new trial may be based on pretrial publicity, a prosecutor's improper closing argument, and the combined effect of publicity and prosecutorial zeal. Thus, we "widen the breadth of

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<sup>311</sup> Rule 33 was "stylistically" amended in 2002 "to make [it] more easily understood and to make style and terminology consistent throughout the rules." See Fed.R.Crim.P. 33 advisory committee's note (2002). The earlier revision was not subdivided, but the relevant wording remained the same.



our consideration" to determine whether "these two factors operating together deprived the [defendant] of a fair trial." *Williams*, 523 F.2d at 1204-05, 1209; see also *Jordan v. Lippman*, 763 F.2d 1265, 1266, 1267, 1269, 1279 (11th Cir.1985) (finding that, in a state habeas corpus proceeding, a new trial based on a change of venue was required when "extensive publicity" was coupled with the community's "long history of racial turbulence" and the involved institution's "economic and social impact" on community).

Attorneys representing the United States are burdened both with an obligation to zealously represent the government and, as a "representative of a government dedicated to fairness and equal justice to all," an "overriding obligation of fairness" to defendants. *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir.1998). A prosecutor may not make improper assertions, insinuations, or suggestions that could inflame the jury's prejudices or passions. *United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir.1985). Such an obligation includes a "duty to refrain from improper methods calculated to produce a wrongful conviction." *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir.1994) (internal citation omitted). A trial may be rendered fundamentally unfair by the prosecution's use of factually contradictory theories. See *Smith v. Goose*, 205 F.3d 1045, 1051-52 (8th Cir.2000) (holding that the prosecution's use of contradictory theories for different defendants in a murder trial violated due

process).<sup>312</sup> A prosecutor's reliance on a legal position

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<sup>312</sup> We note that judicial equitable estoppel generally bars a party from asserting a position in a legal proceeding that is inconsistent with its position in a previous, *related* proceeding. See *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001). As discussed earlier, one of the arguments Guerrero made in his motion for a new trial (which was adopted by Campa, Gonzalez, Hernandez and Medina) was that the government contradicted its position on change of venue in this case with the position that it took regarding the motion for change of venue that it filed in the *Ramirez* case. See *supra* at 1253-54. But, judicial equitable estoppel is not applicable here because *Ramirez*, a civil case, was unrelated to this criminal prosecution. However, because the doctrine seeks to prevent a "party from 'playing fast and loose' " with the courts, the guidance that it provides may be helpful to parties considering a change in their subsequent position in unrelated litigation based upon the same set of facts. See 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4477 (2d ed.2002).

We also note that the rule against the use of evidence of other crimes or bad acts by a defendant is intended to prevent a conviction based on the theory of "Give a dog an ill name and hang him." *United States v. Boyd*, 446 F.2d 1267, 1273 (5th Cir.1971)(citation and internal punctuation omitted). The interest of the United States Attorney, as representative

of a sovereignty whose obligation is to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done .... He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

despite "knowing full well" that it is wrong is "reprehensible" in light of his duty "by virtue of his oath of office." *United States v. Masters*, 118 F.3d 1524, 1525 & n. 4 (11th Cir.1997) (per curiam). Further, when the government has sought to foreclose the submission of evidence, an evidentiary hearing is warranted on a motion for new trial when the newly-discovered evidence "might likely lead" to a new trial. *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir.1990) (per curiam).

Here, a new trial was mandated by the perfect storm created when the surge of pervasive community sentiment, and extensive publicity both before and during the trial, merged with the improper prosecutorial references. The district court's instructions to the jury only generally reminded the jury that statements by the attorneys were not evidence to be considered. The community's displeasure with the Elian Gonzalez controversy paled in comparison with its revulsion toward the BTTR shutdown. In a civil case which arose out of the same facts as this criminal prosecution, the

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*Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Because "the average jury ... has confidence that these obligations will be faithfully observed, ... improper suggestions [and] insinuations ... are apt to carry much weight against the accused when they should properly carry none." *Id.* at 88, 55 S.Ct. at 633. "Where such conduct was pronounced and persistent, with a probable cumulative effect upon the jury which can not be disregarded as inconsequential[,] [a] new trial must be awarded." *Id.* at 89, 55 S.Ct. at 633.

BTTR shutdown was described as an "outrageous contempt for international law and basic human rights" perpetrated by the Cuban government in murdering "four human beings" who were "Brothers to the Rescue pilots, flying two civilian, unarmed planes on a routine humanitarian mission, searching for rafters in the waters between Cuba and the Florida Keys." *Alejandro*, 996 F.Supp. at 1242. In *Ramirez*, the government not only recognized the effect of the Elian Gonzalez matter on the community, but also that the publicity continued through 2002. *See supra* at 1254-55. If the effect of those inflamed passions is clear in an employment discrimination action against the agency which contributed to Elian Gonzalez's removal and which failed to support the Cuban exiles' position, it is manifest in a criminal case against admitted Cuban spies who were alleged to have contributed to the murder of "humanitarians" working to rescue rafters such as Elian Gonzalez.

### III. CONCLUSION

In light of the foregoing discussion, the defendants' convictions are REVERSED and we REMAND for a new trial.

The court is aware that, for many of the same reasons discussed above, the reversal of these convictions will be unpopular and even offensive to many citizens. However, the court is equally mindful that those same citizens cherish and support the freedoms they enjoy in this country that are unavailable to residents of Cuba. One of our most sacred freedoms is the right to be tried fairly in a noncoercive atmosphere. The court is cognizant that its judgment today will be received by those citizens

with grave disappointment, but is equally confident of our shared commitment to scrupulously protect our freedoms. The Cuban-American community is a bastion of the traditional values that make America great. Included in those values are the rights of the accused criminal that insure a fair trial. Thus, in the final analysis, we trust that any disappointment with our judgment in this case will be tempered and balanced by the recognition that we are a nation of laws in which every defendant, no matter how unpopular, must be treated fairly. Our Constitution requires no less.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

GERARDO HERNANDEZ A/K/A MANUEL  
VIRAMONTEZ, ET AL., DEFENDANTS.

United States District Court, S.D. Florida.

No. 98-0721-CR.

July 27, 2000.

Cuban defendants were charged with conspiracy to become unregistered foreign agents, becoming unregistered foreign agents, and conspiracy to commit espionage. Defendants moved for change of venue. The District Court, Lenard, J., held that defendants did not show that pretrial publicity was sufficiently pervasive to warrant change of venue.

Denied.

**ORDER DENYING WITHOUT PREJUDICE  
MOTIONS FOR CHANGE OF VENUE**

LENARD, District Judge.

THIS CAUSE is before the Court on Defendants' Motions for Change of Venue. (D.E.# 317, 321, 329.) Having reviewed the Motions and the record, having heard the oral arguments of the parties, and having been otherwise advised in the premises, the Court finds, for the reasons set forth below, that Defendants have failed to demonstrate that a change



of venue is required to protect Defendants' right to receive a fair trial by an impartial jury.

## I. INTRODUCTION

The Second Superseding Indictment charges Defendants in this case with, *inter alia*, conspiracy to become unregistered foreign agents, becoming unregistered foreign agents, and conspiracy to commit espionage. (D.E.# 224.) Defendants are alleged to have been part of a Cuban espionage ring that infiltrated and reported on United States military activities, in particular those occurring at the Naval Air Station at Boca Chica Key, Florida. By a separate count in the Second Superseding Indictment, the conduct of Defendant Gerardo Hernandez is alleged to have culminated in the shoot-down of two private aircraft from the United States and the deaths of four members of Brothers to the Rescue, a Miami-based Cuban exile group.

This case is now set to proceed to jury trial on September 5, 2000, at the United States District Courthouse in Miami, Florida. On January 5, 2000, Defendant Antonio Guerrerro filed the initial Motion for Change of Venue. (D.E.# 317.) Subsequently, Defendants Luis Medina (D.E.# 321), and Ruben Campa (D.E.# 329), filed separate Motions seeking the same relief. Defendants Gerardo Hernandez and Rene Gonzalez have joined in the Motions, but have not filed separate pleadings. The Government filed a Response to the Motions (D.E. # 441), and on June 26, 2000, the parties appeared before the Court for oral argument on the Motions.

## II. ANALYSIS

Defendants seek a change of venue of the trial of this case, i.e., to have the trial held in Fort Lauderdale rather than in Miami.<sup>1</sup> Defendants argue that if the trial is held in Miami they will be denied their rights to due process of law and a fair trial with an impartial jury because of the inflamed atmosphere in this community concerning the activities of the government of the Republic of Cuba. (D.E. # 317 at 2.) In opposition to the Motions, the Government maintains that Defendants have not met their burden of showing that a different jury venire is necessary in these circumstances, and, in particular, disputes the methodology and conclusions of the survey conducted by Defendants' expert in support of their argument that pervasive community prejudice exists.

### *A. Legal Standard*

The Fifth Amendment to the United States Constitution assures a criminal defendant the right to due process of law, and the Sixth Amendment guarantees the right to an "impartial jury." U.S. Const. amend. V, VI. To protect these rights, a district court may transfer proceedings to another district "if the court is satisfied that there exists in

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<sup>1</sup> Defendants' written Motions sought a change of venue from the Southern District of Florida to another judicial district. At oral argument, however, Defendants asked that their Motions be considered requests that the trial be held in Fort Lauderdale, within the Southern District of Florida, rather than Miami. (Tr. of 6/26/00 Hg. at 52:2-7.)

the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district." Fed.R.Cr.P. 21(a); *see also Pamplin v. Mason*, 364 F.2d 1, 5 (5th Cir.1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.")

These protections do not mean, however, that a criminal defendant is constitutionally entitled to a trial by jurors ignorant of issues and events relating to the trial. *See Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Rather, "due process requires only that a jury be seated which can put aside any impressions gained from pretrial publicity and render a fair verdict based exclusively on the evidence presented in court." *United States v. Fuentes-Coba*, 738 F.2d 1191, 1194 (11th Cir.1984) (citing, *inter alia*, *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639), *cert. denied*, 469 U.S. 1213, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985). As the Supreme Court has explained:

In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any

preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

*Irvin*, 366 U.S. at 722-23, 81 S.Ct. 1639.

In seeking a change of venue under Rule 21 prior to trial, the defendant bears the burden of demonstrating: (1) "an actual or identifiable prejudice on the part of the jury resulting from publicity;" (2) "community prejudice actually infecting the jury box;" or (3) sufficient evidence that the pretrial publicity has been "so inflammatory and prejudicial and so pervasive or saturating the community as to render virtually impossible a fair trial by an impartial jury, thus raising a presumption of prejudice." *Ross v. Hopper*, 716 F.2d 1528, 1540 (11th Cir.1983) (internal citations omitted). Whether a change of venue is necessary must be determined from the "totality of the surrounding facts" of the case. *Irvin*, 366 U.S. at 721, 81 S.Ct. 1639. If the court concludes that the defendant has not met the burden of demonstrating prejudice in the community as a whole, the court may then conduct a voir dire examination of the jury to explore any potential bias of the jurors individually. See *Fuentes-Coba*, 738 F.2d at 1195. In assessing the jurors' opinions, the test is "whether the nature and strength of the opinion formed are such as in law necessarily ... raise the presumption of partiality.... Unless [the defendant] shows the actual existence of such an

opinion in the mind of the jurors as will raise the presumption of partiality, the juror need not necessarily be set aside.’ ” *Irvin*, 366 U.S. at 723, 81 S.Ct. 1639 (internal citation omitted).

### *B. Supreme Court Precedent*

The case law governing the issue of the effect of pre-trial publicity stems from two Supreme Court cases in the 1960's, in which publicity and media coverage both before and during the trials rendered them “hollow formalities” at best and “three-ring carnivals” at worst. The first, *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), involved six widely-publicized and brutal murders committed in the vicinity of Evansville, Indiana. Following Irvin's arrest for the murders, the prosecutor disseminated throughout Evansville and its adjoining counties several press-releases stating that Irvin had confessed to the murders. *See Id.* at 719-20, 81 S.Ct. 1639. Irvin's appointed counsel sought and was granted a change of venue, but the trial was moved only to Gibson, the county adjoining Evansville. *See Id.* at 720, 81 S.Ct. 1639. The trial court subsequently denied Irvin's second change of venue motion. *See Id.* Reviewing the evidence Irvin presented in support of his motion, the Court found the evidence of the “build-up of prejudice [to be] clear and convincing:” (1) Irvin's trial had become the “cause celebre of this small community” such that a “roving reporter” solicited and recorded “curbstone opinions” that were later broadcast over local stations; (2) there had been a “barrage” of newspaper headlines, articles, cartoons and pictures during the six months preceding the trial; (3) local news and television stations “blanketed” the community with “extensive

newscasts" about his background; and (4) the media reported Irvin's confession, indictment, and offer to plead guilty in exchange for a life sentence rather than the death penalty. *Id.* at 725, 81 S.Ct. 1639.

In view of these facts, the Court found that "[i]t could not be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." *Id.* at 726, 81 S.Ct. 1639. Examining the voir dire process, the Court determined that a "pattern of deep and bitter prejudice" was present throughout the community as well as among the members of Irvin's jury, two-thirds of whom confessed prior to the trial to having an opinion that he was guilty and a familiarity with the facts and circumstances of the case. *Id.* at 727, 81 S.Ct. 1639. In such circumstances, the Court held that the trial court's finding of the jury's impartiality "did not meet constitutional standards" and therefore, Irvin's detention and death sentence were unconstitutional. *Id.* at 727-28, 81 S.Ct. 1639.

The second case addressed whether Sam Sheppard was deprived of a fair trial in his state conviction for the murder of his wife because of the trial judge's failure to protect him sufficiently from the "massive, pervasive and prejudicial publicity that attended his prosecution." *Sheppard v. Maxwell*, 384 U.S. 333, 334, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). From the moment of the reporting of the death of Sheppard's wife, the media captured every moment of the investigation, prosecution, trial and sentencing including, *inter alia*, Sheppard's reenactment of his version of the events of the night of the murder, the preliminary hearing broadcast live



from the high school gymnasium, and the jurors' visit to the Sheppard home during the trial. See *Id.* at 339-42, 86 S.Ct. 1507. In addition to the escalating intensity of the negative and disparaging pre-trial publicity, the trial judge allowed approximately twenty representatives of the news and wire services to sit inside the bar, behind the counsel table, for the length of the trial. *Id.* at 355, 86 S.Ct. 1507. Prejudice among the jurors was manifest: every juror testified to having read or seen reports of the Sheppard case, and, during the trial, the daily record of the proceedings, including pictures of Sheppard, the judge, the exhibits, and the jurors themselves were printed or broadcast. See *Id.* at 345, 86 S.Ct. 1507 (noting that "[d]uring the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone"). One report referred to the atmosphere surrounding the Sheppard case as a "Roman holiday for the news media." *Id.* at 356, 86 S.Ct. 1507.

Despite this "carnival" surrounding the trial, Sheppard was not granted a change of venue nor was his jury sequestered. *Id.* at 352-53, 86 S.Ct. 1507. Reviewing his habeas corpus petition, the Court held that Sheppard's failure to receive a trial by an impartial jury free from outside influences violated his right to due process. *Id.* at 362, 86 S.Ct. 1507. The Court went on to describe remedial measures the trial judge could have taken "prevent prejudice at its inception," including: (1) asking jurors whether they had read or heard specific prejudicial comment about the case; (2) adopting stricter rules governing the use of the courtroom by the media; (3) insulating the witnesses; (4) sequestering the jurors; (5) controlling the release of leads, information and gossip to the

press by members of the prosecution; and (6) proscribing extrajudicial statements by any lawyer, party, witness, or court official containing potentially prejudicial matters. See *Id.* at 361, 86 S.Ct. 1507.

The Supreme Court later characterized the proceedings in *Irvin* and *Sheppard* as "entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The *Murphy* court then distinguished "largely factual publicity from that which is invidious or inflammatory." *Id.* at 801-02, 95 S.Ct. 2031. Noting that the majority of reports, primarily factual in nature, concerning Murphy had appeared more than seven months prior to jury selection and that only twenty of eighty potential jurors were excused based on their opinion of Murphy's guilt (as compared to 268 excused out of 430 veniremen in *Sheppard* ), the Court found that the circumstances did not "suggest a community with sentiment so poisoned against [Murphy] as to impeach the indifference of jurors who displayed no animus of their own." *Id.* at 803, 95 S.Ct. 2031. Thus, the Court held that Murphy had failed to show that the circumstances of his trial were inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. *Id.*

### *C. Eleventh Circuit Precedent*

Subsequent to the Supreme Court's holding in *Murphy*, the courts in this Circuit have been cautious to provide procedural safeguards to prevent the prejudicial impact of pre-trial publicity. In *United States v. Capo*, 595 F.2d 1086, 1091 (5th Cir.1979),

after first finding that the record did not demonstrate the "degree of pervasive community prejudice which would warrant a presumption of jury prejudice," the Court of Appeals held that the "elaborate measures" taken by the district court to ensure that an impartial jury was impaneled also precluded a finding of "prejudice in fact." *Id.* The district court first conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict and instructing them to decide the case strictly on the evidence and not to discuss the case or read or listen to any news reports on the proceedings. *Id.* at 1091. Over the course of ten days, the court then conducted, in camera in the presence of defense counsel, an individual voir dire of each of the jurors based on questions requested by the defense to elicit each juror's knowledge of the case and the details of the crime and any preconceived opinions or partiality. *Id.* At the end of each day and prior to each recess, the court warned the jurors not to discuss the case or read or listen to any news reports. *Id.* at 1092. Under these circumstances, the Court of Appeals was "satisfied that the procedural safeguards taken by the court produced a fair and disinterested panel of jurors." *Id.* at 1092.

In a case involving a Cuban defendant convicted of violating the Trading With the Enemy Act and the Cuban Assets Control Regulations, the Eleventh Circuit held that the voir dire procedures guaranteed that the jury selected was able to "put aside any impressions gained from pre-trial publicity and render a fair verdict based exclusively on the evidence presented in court" and affirmed the district

court's denial of the pre-trial motion for change of venue. *United States v. Fuentes-Coba*, 738 F.2d 1191, 1194 (11th Cir.1984). In ruling on the change of venue motion, the district court first reviewed the survey evidence the defendant had presented and determined that the pre-trial publicity was not so inflammatory as to raise a presumption of prejudice. *Id.* at 1194. The court then conducted a voir dire of the jurors, during which defense counsel "extensively inquired" of the potential jurors with respect to their feelings about Cuba and Cuban-sympathetic organizations. *Id.* The Eleventh Circuit held that this "thorough inquiry" of the jury panel on the issue of their potential bias was sufficient to guarantee the defendant's right to a fair trial. *Id.* at 1195.

*D. Defendants Have Not Presented Evidence of Pervasive Community Prejudice as Would Preclude the Selection of a Fair and Impartial Jury in This Case.*<sup>2</sup>

In support of their Motions, Defendants have provided the Court with more than thirty articles on their case and other Cuba-related issues over the last two years. Defendants argue that these articles demonstrate that the community atmosphere is "so

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<sup>2</sup> As the Court has yet to empanel the jury venire, any claim that there exists actual or identifiable prejudice of jury members or that community prejudice actually infected the jury box is not yet ripe. Further, the Court construes Defendants' Motions as directed primarily toward the issue of "pervasive community prejudice," and, accordingly, the Court's analysis focuses on the third inquiry set forth in *Ross*. See *Ross*, 716 F.2d at 1540.

pervasively inflamed" that "resort to questioning in the cool reflection of a courtroom is not sufficient to cleanse the record." (D.E. # 317 at 3.) Defendants argue that community influences will affect any juror's ability to reach a fair verdict. (*Id.* at 6.)

In response, the Government asserts that the Defendants have failed to carry their burden of demonstrating that it is impossible to select a fair and impartial jury in this community. (D.E. # 441 at 3.) The Government maintains that an extensive voir dire of prospective jurors is preferable to a change of venue "because it provides actual, rather than speculative, observation" of the venire and "presents the opportunity to eliminate preconceptions and to determine whether jurors can be 'cured' of prejudice." (*Id.* at 3-4.)

The Court has reviewed the articles submitted by Defendants and finds that the majority of these articles relate to events other than the espionage activities in which Defendants were allegedly involved. (See, *e.g.*, D.E. # 329 Ex. I ("Former U.S. POWS Detail Torture by Cubans in Vietnam"); Ex. L (discussing protests of performance by Cuban band); Ex. N, O, P (discussing Elian Gonzalez).) With the exception of articles relating to the sentencing of two co-defendants and one editorial connoting the anniversary of the shoot-down, the articles that do pertain to the downing of the Brothers-to-the-Rescue plane were published more than one year ago, see *Capo*, 595 F.2d at 1091 (noting that local news coverage of crimes had subsided substantially by the time of trial), and discuss matters that are largely factual in nature. See *Murphy*, 421 U.S. at 801-02, 95 S.Ct. 2031 (distinguishing factual publicity from

that which is invidious or inflammatory). (See, e.g., D.E. # 329 Ex. A, B, C, D, E, H.) Based on its review of the materials presented by Defendants, the Court finds that the pretrial publicity has not been "so inflammatory and pervasive as to raise a presumption of prejudice" among the potential jury venire in this case. *Ross*, 716 F.2d at 1541.

In further support of their Motion, Defendants introduced the results of a random survey conducted by Professor Gary Moran.<sup>3</sup> (D.E. # 321 Ex. A.) Between December 9 and December 14, 1999, Professor Moran conducted a random survey of 300 registered voters in Miami-Dade County. The survey elicited responses to a questionnaire consisting of eight opinion and twenty demographic inquiries, designed to examine prejudice against anyone alleged to have assisted the Cuban government in espionage activities. (*Id.* at 16.) According to Professor Moran, the results of the survey indicated: (1) that 69% (with a sampling error of 5.3%) of eligible jurors are prejudiced; (2) that 40% of survey respondents (60% of Hispanic respondents) would find it difficult to be impartial, of which 90% would not change their minds under any circumstances; and (3) approximately 1/3 of the respondents are "at least

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<sup>3</sup> Professor Moran holds a Bachelor of Arts degree from the University of Florida, a Master's Degree in Psychology from the University of Detroit, and a Ph.D. in Psychology from the Catholic University at Nijmegen, the Netherlands. (D.E. # 321 Ex. A at 1.) He is currently a Professor of Psychology at Florida International University. (*Id.*)



somewhat worried about community criticism in the event of a 'not guilty' verdict." (*Id.*)

The Government argues that Professor Moran's survey is unworthy of this Court's reliance due to numerous flaws in Professor Moran's procedures and conclusions which call into question the validity of his survey. (D.E. # 441 at 6.) The Government takes issue with Professor Moran's reliance on two prior surveys concerning South Floridians' attitudes toward Cuba,<sup>4</sup> and argues that the present survey "is not well designed and does not support the conclusions and resulting opinion" of Professor Moran. (*Id.* at 8-9.)

In support of its position, the Government has submitted the affidavit and curriculum vitae of Professor J. Daniel McKnight.<sup>5</sup> Professor McKnight

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<sup>4</sup> The first survey was conducted by Jay Schulman in *United States v. Fuentes-Coba*, 738 F.2d 1191 (11th Cir.1984), in which the Eleventh Circuit affirmed the district court's denial of the motion for change of venue. Professor Moran conducted the second survey in the case of *United States v. Broder*, Case No. 97-267-CR-GRAHAM, in which the district court also denied the defendants' motion for change of venue.

<sup>5</sup> Professor McKnight is a social psychologist specializing in social perception, research methodology, and psychometrics. (D.E. # 441 Ex. B at 1.) He holds a Bachelor's degree in Psychology from the University of Illinois at Chicago, and a Master's degree and Ph.D. in Psychology from the State University of New York at Stony Brook. (*Id.*) He has completed a post-doctoral fellowship in Cardiovascular Behavioral Medicine-Psychophysiology at the Western Psychiatric Institute & Clinic, University of Pittsburgh Medical Center. (*Id.*) As of

opined that Professor Moran's prior survey,<sup>6</sup> which concluded that a "substantial prejudice [existed] in the Southern District of Florida against a defendant alleged to have helped the Castro government," (D.E. # 441 Ex. A at 13), lacked "empirical rigor, scientific validity and provides no estimation of its scientific reliability." (D.E. # 441 Ex. B at 2.)

The Court has reviewed the questionnaire and Professor Moran's interpretation of the responses, and, based on the following findings, declines to afford the survey and Professor Moran's conclusions the weight attributed by Defendants. First, the Court finds that 54% of all respondents and 48.5% of Hispanic respondents stated that they were not

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August 1997, he was a consultant with Zagnoli McEvoy Foley Ltd., in Chicago, Illinois. (*Id.*)

<sup>6</sup> Professor McKnight's affidavit was previously offered in rebuttal to the defendant's reliance on Professor Moran's survey in support of the motion for change of venue in *Broder*. See note 4, *supra*. The Court has reviewed Professor Moran's prior survey, analysis and conclusions, and finds that there are substantial similarities with Professor Moran's analysis and conclusions in the survey in the case sub judice. For example, question 6 in the present survey ("Castro's Cuba is an enemy of the United States.") (D.E. # 321 Ex. E at 2) also appears in the *Broder* survey (question 5). (D.E. # 441 Ex. A at 11.) In addition, many areas of Professor Moran's analysis and conclusions in his affidavit in this case appear verbatim in the *Broder* affidavit. (Compare D.E. # 321 Ex. A 7-9, 12-16 with D.E. # 441 Ex. A 8-10, 14-16.) Therefore, based on these similarities, the Court deems Professor McKnight's critique of the *Broder* survey equally applicable to Professor Moran's survey in this case.

aware of this case altogether. (D.E. # 321 Ex. E at 1.) Yet, Professor Moran appears to have included these respondents in quantifying the alleged prejudice in this community against Defendants.

Second, although prejudice is an attitude directed toward members of a group solely based on their membership in that group, the questions Professor Moran used to calculate prejudice do not reference a "social target" of the prejudicial attitude. (See McKnight Aff. at 2 (D.E. # 441 Ex. B).) Therefore, Professor Moran's calculation of prejudice is without substantial support, thus rendering it unreliable.

Third, in those questions in which a social target is mentioned, Professor Moran has done so in non-neutral terms characterizing actors subjectively, a method contrary to standard scientific procedure. (*Id.*) For example:

2. These defendants are charged with setting up the ambush of the Brothers to the Rescue planes in which four people were killed. This type of activity is characteristic of the Castro regime.

3. The aim of Castro is to undermine legitimate Cuban exile organizations.

5. Castro's agents have attempted to disrupt peaceful demonstrations such as the Movimiento Democracia's flotillas which honor fallen comrades.

(D.E. # 321 Ex. E at 2 (emphasis added).)

Therefore, because Professor Moran failed to use neutral terminology, the questions in the survey cannot validly assess social prejudice.

Fourth, several of Professor Moran's questions are ambiguous, casting further doubt on the accuracy of the response provided. For instance, question 10 asks if there are "any circumstances" that would change the respondent's "opinion," but does not clarify to which opinion the question refers. (D.E. # 321 Ex. E at 2.)

Fifth, Professor McKnight pointed out in the *Broder* survey, the sample size of 250 respondent constituted less than 0.003% of eligible jurors in Miami-Dade County in 1992, and could not be considered representative of the population at that time. (McKnight Aff. at 4-5 (D.E. # 441 at 4-5).) Similarly, the size of the statistical sample in this case (300 respondents) is too small to be representative of the population of potential jurors in Miami-Dade County.

Finally, and most significantly, Professor Moran attempts to bolster his conclusion that community prejudice exists by referencing the earlier study of anti-Cuban sentiment in South Florida that was introduced in *Fuentes-Coba*, in which the district court concluded-and the Eleventh Circuit affirmed-that the survey did not give rise to a presumption of prejudice. See *Fuentes-Coba*, 738 F.2d 1191. Due to its ambiguity and lack of clarity and reliability, therefore, the Court is unwilling to give Professor

Moran's survey substantial weight in determining whether Defendants are entitled to a change of venue. *See Id.*

Based on the articles and Professor Moran's survey, Defendants portray their case as identical to the circumstances in *United States v. McVeigh*, 918 F.Supp. 1467 (W.D.Okla.1996), in which Judge Matsch granted a change of venue to Colorado for the trial of the Oklahoma City bombers. In granting the defendants' motion-which the Government did not oppose-Judge Matsch emphasized the strong judicial preference for careful voir dire and noted that extensive pre-trial publicity does not per se preclude a finding of fairness in the conduct of the trial. *Id.* at 1470, 1473. Because of: (1) the demonization of the defendants in contrast to the intense humanization of the victims; (2) the character of the crimes charged; and (3) the "profound and pervasive" effects of the explosion such "that no detailed discussion of the evidence [was] necessary," Judge Matsch concluded that there was "so great a prejudice against [the] two defendants in the State of Oklahoma that they [could] not obtain a fair and impartial trial" anywhere in the state. *Id.* at 1474.

The volume and character of the evidence justifying a change of venue in *McVeigh* far outweighs the evidence Defendants have submitted in support of their argument that pervasive community prejudice exists in this case. *See McVeigh*, 918 F.Supp. at 1470 (evidence submitted included, *inter alia*, videotapes of local and national telecasts from the date of the bombing to the date of the motions hearing). Thus, while the pretrial atmosphere in Oklahoma City was more akin to that

of the *Irvin* trial, this case is substantially similar to that in *Ross* or *Fuentes-Coba*, in which the pretrial publicity did not rise to a sufficient level to raise a presumption of prejudice in the community. See *Fuentes-Coba*, 738 F.2d at 1194; *Ross*, 716 F.2d at 1541. Thus, the Court finds that Defendants have not adduced evidence sufficient to raise a presumption of prejudice against Defendants as would impair their right to a fair trial by an impartial jury in Miami-Dade County. See *Fuentes-Coba*, 738 F.2d at 1194-95; *Ross*, 716 F.2d at 1541.

### III. CONCLUSION

The Court finds that Defendants have not demonstrated the degree of pervasive community prejudice which would warrant a presumption of jury prejudice, and that thorough voir dire, conducted in a manner similar to *Ross*, 716 F.2d at 1540, and *Fuentes-Coba*, 738 F.2d at 1194-95, and careful instructions to the jury throughout trial will enable the Court to safeguard Defendants' right to a fair and impartial jury in Miami-Dade County. In addition, the Court notes that if the Court determines during voir dire that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motions for Change of Venue (D.E.# 317, 321, 329) are DENIED WITHOUT PREJUDICE. It is further

ORDERED AND ADJUDGED that counsel for the Government and counsel for Defendants shall have



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up to and including August 21, 2000 to file with the Court any proposed voir dire questions.

S.D.Fla.,2000.

U.S. v. Hernandez

106 F.Supp.2d 1317, 14 Fla. L. Weekly Fed. D 1

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 98-0721-CR-LENARD/DUBÉ

**UNITED STATES OF AMERICA,**

Plaintiff,

vs.

**JOHN DOE NO. 3 a/k/a RUBEN  
CAMPA, et al.,**

Defendant.

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

**THIS CAUSE** is before the Court on the Motion for Reconsideration of This Court's Denial of Defendant's Motion for a Change of Venue, filed September 15, 2000 by Defendant Ruben Campa. The Government filed a Response on October 2, 2000. Having reviewed the Motion, the Response, and the record, the Court finds as follows.

Defendant Campa moves the Court to reconsider its Order Denying without Prejudice Motions for Change of Venue (D.E. 586), issued July 27, 2000. Defendant Campa renews the arguments alleged in the previous Motions for Change of Venue, which the Court denied, and contends that the Court did not address how Defendants' theory of defense affects their ability to receive a fair trial in Miami, which community "is undeniably and strongly opposed to the Castro regime and its perceived

sympathizers and supporters.” (Def. Campa’s Mot. Reconsideration at 2.) Defendant Campa distinguishes the instant case from that of Mariano Faget, who was recently charged with passing United States classified information to the Cuban government. Defendant Campa stated that Faget’s defense “relied . . . on his vehement denial of any support or sympathy for the Cuban government.” (*Id.* at 3.) By contrast, Defendant Campa emphasizes that the affirmative defense of necessity, which Defendants have asserted here, “would . . . quickly cast Mr. Campa and his co-defendants as villainous Castro sympathizers.” (*Id.*) In support of this argument, Defendant Campa submits a six news articles published after the Court denied the Motions for Change of Venue on July 27, 2000.

As to Defendants’ renewed arguments, the Court finds that its Order of July 27, 2000 sufficiently addressed them and need not discuss them further. The Court finds that Defendants have previously raised the argument that the defense of necessity will uniquely prejudice Defendants if tried before a Miami jury, and that the Court’s reasoning in its Order Denying Motions for Change of Venue adequately addresses this argument.

Moreover, the Court reiterates that “the court may conduct a voir dire examination of the jury to explore any potential bias of the jurors individually.” (Order Denying Mots. Change Venue at 4 (citing United States v. Fuentes-Coba, 738 F.2d 1191, 1195 (11th Cir. 1984))), and that “careful instructions to the jury throughout trial will enable the Court to safeguard Defendants’ right to a fair and impartial jury in Miami-Dade County.” (Order Denying Mots.

Change Venue at 17.) Again, "if the Court determines during voir dire that a fair and impartial jury cannot be empaneled, Defendants may renew this Motion and the Court shall consider a potential change of venue at that time." (Id.) Accordingly, it is

**ORDERED AND ADJUDGED** that the Motion for Reconsideration of This Court's Denial of Defendant's Motion for a Change of Venue (D.E. 656), filed September 15, 2000 by Defendant Ruben Campa, is **DENIED**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 24 day of October, 2000.

**JOAN A.  
LENARD  
UNITED  
STATES  
DISTRICT  
JUDGE**

cc: United States Magistrate Robert L. Dubé

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**Case No. 98-0721-CR-LENARD/DUBE**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 98-0721-CR-LENARD/DUBÉ

**UNITED STATES OF AMERICA,**

Plaintiff,

vs.

**GERARDO HERNANDEZ, et al.,**

Defendants.

**ORDER DENYING DEFENDANT GERARDO  
HERNANDEZ'S  
MOTION FOR JUDGMENT OF ACQUITTAL  
AND  
MOTION FOR NEW TRIAL**

**THIS CAUSE** is before the Court on the Motion for Judgment of Acquittal and Motion for New Trial, filed June 15, 2001 by Defendant Gerardo Hernandez. The Government filed a Response on June 29, 2001. On July 11, 2001, Defendant Hernandez filed a Reply. Having reviewed the Motion, the Response, the Reply, and the record, the Court finds as follows.

**INTRODUCTION**

Five defendants stood trial for over six months on counts of entering, and conspiracy to enter, the United States as foreign agents without prior notification to the Attorney General or, alternatively, with the purpose to defraud the U.S. Government;



conspiracy to deliver information, relating to the national security of the United States, to Cuba for the purpose of injuring the United States or benefitting Cuba; and using falsified passports to enter the United States. Defendant Hernandez was charged in Count 3 of the Superseding Indictment with conspiracy to murder the pilots and passengers of the Brothers to the Rescue planes, shot down by Cuban MiG's on February 24, 1996. On July 8, 2001, the jury returned a verdict of guilty on all Counts, including Count 3.

Defendant Hernandez moves for a judgment of acquittal as to Count 3, pursuant to Federal Rule of Criminal Procedure 29(c),<sup>7</sup> and, in the alternative, a new trial on Count 3, pursuant to Federal Rule of Criminal Procedure 33.<sup>8</sup> Defendant Hernandez

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<sup>7</sup> Federal Rule of Criminal Procedure 29(c) provides in pertinent part that:

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

<sup>8</sup> Federal Rule of Criminal Procedure 33 provides in pertinent part that "[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice require . . . . A motion for a new trial may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

argues that the Government did not meet its burden of proof with respect to Defendant Hernandez's mens rea for Count 3 — specifically, the Government failed to show beyond a reasonable doubt that Defendant Hernandez knew that the shootdown was planned to occur in international airspace. In support of this contention, Defendant Hernandez cites to HF 115, DG-104, HF 119, DG-108, statements by the prosecution at closing, and a quote from the jury foreman in The Miami Herald. Should the Court elect not to grant Defendant Hernandez's Motion for Judgment of Acquittal, he urges the Court, in the alternative, to grant him a new trial on Count 3, "based on the government's blatantly improper closing argument, continuous misstatement of the law and invitation of the jury to disregard or nullify the Court's instructions, which in fact the jury did based on post verdict interviews with the media." (Mot. J. Acquittal & Mot. New Trial at 13.)

The Government maintains that Defendant Hernandez has waived his argument regarding Defendant Hernandez's mens rea because he failed to raise that argument in his Rule 29 Motion for Judgment of Acquittal, filed March 2, 2001. Responding to the merits of Defendant Hernandez's arguments, the Government contends that the propagandizing leaflets were provocative incursions that prompted the shootdown. Citing to HF-108, HF-111, HF-115, HF-116, HF-126, HF-127, HF-128, DG-104, and DG-108 as well as the trial-testimony of White House advisor on Cuban policy, Richard Nuccio, the Government argues that Defendant Hernandez and the Cuban government sought to terminate contact between Cuba's internal dissidents

and the Cuban exile groups in Miami, such as Concilio Cubano and Brothers to the Rescue, and that the shutdown was the remedy. The Government also states that "the sustaining of objections does not itself reflect prosecutorial misconduct." (Gov't's Resp. at 13.)

## **MOTION FOR JUDGMENT OF ACQUITTAL**

### **Standard of Review**

The Eleventh Circuit mandates that when considering a Rule 29(c) motion for judgment of acquittal, "a district court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction." United States v. Ward, 197 F.3d 1076, 1079 (11th Cir. 2000) (citation omitted). The Ward court elaborated upon this standard of review as follows:

The district court must view the evidence in the light most favorable to the government. . . . The court must resolve any conflicts in the evidence in favor of the government, . . . and must accept all reasonable inferences that tend to support the government's case. . . . The court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. . . . "It is not necessary for the evidence to exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence establishes guilt beyond a

reasonable doubt.”. . . A jury is free to choose among reasonable constructions of the evidence. . . . The court must accept all of the jury’s “reasonable inferences and credibility determinations.”

Ward. 197 F.3d at 1079 (citations omitted).

## Analysis

Even assuming arguendo that Defendant Hernandez has not waived his right to argue that the Government did not meet its burden of proof as to his mens rea for the charges alleged in Count 3, the Court finds that it cannot grant a judgment of acquittal on Count 3.

Construing the evidence in the Government’s favor, the Court finds a reasonable inference can be made from the evidence that Defendant Hernandez knew that the Brothers to the Rescue (“BTTR”) shootdown of February 24, 1996 was to occur in international airspace. In support of this finding is HF-115, which provides in pertinent part:

Superior Headquarters approved Operation Escorpion in order to perfect a confrontation of [counter revolutionary] actions of BTTR. Info from German and Castor should come with clear and precise specifications that allow to know without a doubt that Basulto is flying, whether or not activity of dropping of leaflets or violation of air space; if Castor and German are or are not flying, anticipated plan any type BTTR flights,

in order to know about these activities ahead of time. If there is not access this should also be a priority. Always specify if agents are flying.

(Mot. J. Acquittal Mot. New Trial Ex. A at 1.) While Defendant Hernandez argues that the language, "dropping of leaflets or violation of air space," indicates that the plan was to fire on the BTTR planes, only upon violations of Cuban airspace, the Court disagrees. (*Id.*) Instead, the Court finds a reasonable inference can be made from the disjunctive phrase, "dropping of leaflets or violation of air space," that the plan was to shoot down the planes, upon either a violation of Cuban air space or the dropping of leaflets. (*Id.*) Under this line of reasoning, violating Cuban airspace was not the only preordained reason given by the conspirators to shoot down the BTTR planes.

Also, the Court finds a reasonable inference can be made from (a) Nuccio's testimony, describing Cuba's intent to cease the contact between Cuban insurgents on the island and Cuban exile groups in Miami, and (b) HF-108, in which Cuba's head of intelligence refers to the BTTR leaflets as "propaganda," such that Defendant Hernandez and the Cuban government perceived the dropping of leaflets as an incursion itself. Even if the leaflets were dropped from international airspace, at least twelve miles from Cuban shores, the Court finds that a reasonable juror could conclude that the Cuban government perceived such an act as grounds for shooting down the BTTR planes. Likewise, the Court finds a reasonable inference can be made from the foregoing evidence that the "provocations" mentioned

in DG-108 referred to the dropping of leaflets from international airspace. Indeed, in the Eleventh Circuit, the prosecution need not show that defendants, being tried for conspiracy, "knew all of the details of the alleged conspiracy as knowledge of the essential objective is sufficient to impose liability." United States v. Johnson, 889 F.2d 1032, 1035 (11th Cir. 1989) (citing United States v. Elledge, 723 F.2d 864, 865 (11th Cir. 1984)).

Furthermore, DG-104 is a Cuban government-message reminding Defendant Hernandez that "we need to pinpoint in more detail everything related to new incursions by Brothers to the Rescue to be carried out in our country," and that such details included, but were not limited to, "whether the activity is to drop leaflets or violate the air space." (Mot. J. Acquittal Mot. New Trial Ex. B at 1.) The Court finds a reasonable inference can be made from this message that Defendant Hernandez and the Cuban government viewed both dropping leaflets and violating airspace as "new incursions." (*Id.*)

In addition, the Court finds that "the sustaining of objections does not itself reflect prosecutorial misconduct." (Resp. at 13.) The Court sustained counsel for Defendant Hernandez's objections to the Government's characterizations of the jury instructions for Count 3 made during closing arguments. At the conclusion of closing arguments, the Court provided each juror with a written copy of the Court's instructions on the law for all Counts, including Count 3, to follow as the Court instructed. These packets of jury instructions were then available for each juror's use and reference during deliberations. As such, the Court finds that



Defendant Hernandez was not prejudiced by the prosecution's typification of the Court's jury instructions at closing argument. The Court thus finds that neither the prosecution's closing arguments nor the statements of the jury foreman reported in The Miami Herald merit a judgment of acquittal.

These instructions did not charge the jury with determining whether the shutdown actually occurred in international airspace, but whether the shutdown was planned to occur in international airspace. Evidence of what actually occurred however can be used ex post as proof of what was deigned in the conspiracy. Johnson, 889 F.2d at 1035 (citing United States v. Bascero, 742 F.2d 1335, 1359 (11th Cir.), cert. denied, 472 U.S. 1021 (1984)). The Court finds that based upon the evidence, demonstrating that the shutdown actually occurred in international airspace, a reasonable juror could conclude that the shutdown was to occur in international airspace. The Court also finds a reasonable inference can be made from HF-127 and HF-128, congratulating Defendant Hernandez on his effort related to the BTTR shutdown, that Defendant Hernandez knew the plan was to shoot down the BTTR planes in international airspace. In addition, a reasonable inference can be made that the leaflets were dropped from international airspace, based on Basulto's trial-testimony. While Defendant Hernandez highlights a number of exhibits, showcasing the Cuban government's concern regarding the encroachment of its airspace and indicating that both governments knew of the BTTR's January 1996 leaflet-dropping over Cuban waters, the Court nevertheless finds that

such a concern neither overrides other concerns, namely the dropping of leaflets from international airspace, nor eliminates the aforementioned evidence probative of Defendant Hernandez's knowledge that the shutdown was to occur in international airspace.

Thus, accepting all reasonable inferences from the evidence in favor of the Government, the Court finds that Defendant Hernandez's Rule 29(c) Motion for Judgment of Acquittal is denied.

### **MOTION FOR NEW TRIAL**

Courts may grant a new trial, when the interest of justice so requires or when a criminal defendant was unable to receive a fair trial and suffered "actual, compelling prejudice." United States v. Pedrick, 181 F.3d 1264, 1267 (11th Cir. 1999) (citing United States v. Cassano, 132 F.3d 646, 651 (11th Cir.), cert. denied, 525 U.S. 840 (1998)). Nevertheless, the Court's "standard of review in granting a new trial 'is addressed to the discretion of the trial judge . . . . Such motions are not favored and are granted with great caution.'" United States v. Harris, Civ. A. No. 93-52, 1993 WL 483484, \*2 (E.D.La. Nov. 12, 1993) (citing United States v. Hamilton, 559 F.2d 1370, 1373 (5th Cir. 1977)<sup>9</sup>). As discussed, infra at II.B, the Court finds that the conduct of the prosecution and the jury foreman's statement in the newspaper did not prejudice

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<sup>9</sup> In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

Defendant Hernandez, such that a new trial on Count 3 is merited.

Accordingly, it is

**ORDERED AND ADJUDGED** that the Motion for Judgment of Acquittal and Motion for New Trial, filed June 15, 2001 by Defendant Gerardo Hernandez, is **DENIED**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 28 day of November, 2001.

**JOAN A.  
LENARD  
UNITED  
STATES  
DISTRICT  
JUDGE**

cc: United States Magistrate Robert L. Dubé

Caroline Heck Miller,  
AUSA  
99 NE 4th Street  
Miami, Florida 33132-  
2111

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3225 Aviation Avenue,  
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33133-4741

353a

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1555

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5964

**Case No. 98-0721-CR-LENARD/DUBE**

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USDC FLSD 245b (Rev 3/01). Judgment in a  
Criminal Case

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

GERARDO HERNANDEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses  
Committed On or After November 1, 1987)

Case Number: 1:98cr0721-001

Counsel For Defendant: Paul McKenna, Esq.

Counsel For The United States: Caroline Heck  
Miller, AUSA

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 2, 3, 4, 5,  
6, 13, 15, 16, 19, 22, 23 and 24 of the Second  
Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the  
defendant is guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794 (c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18USC§1117	Conspiracy to commit murder	09/12/1998	3
18 USC § 1546(a)	Fraud and misuse of documents	08/25/1998	4
18 USC § 1546(a)	Fraud and misuse of documents	07/22/1996	6
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	5



18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	13, 15, 16, 22, 23, 24
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	2/23/1996	19

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

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If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. xxx-xx-xxxx

Date of Imposition of Sentence:

December 12, 2001

Defendant's Date of Birth: 06/04/1965

Deft's U.S. Marshal No .: 58739-004

Defendant's Mailing Address:

FDC -33 NE Fourth Street

Miami, FL 33132

Defendant's Residence Address :

FDC -33 NE Fourth Street

Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 12, 2001

# IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life Imprisonment** as to Counts 2 & 3 to run concurrently; 60 months as to Count 1; 36 months as to Count 5 and 120 months as to Counts 4, 6, 13, 15, 16, 19, 22, 23 and 24. These counts shall run concurrently with one another and concurrently with the sentences imposed as to Counts 2 and 3.

The defendant is remanded to the custody of the United States Marshal.

# RETURN

I have executed this judgment as follows:

Defendant delivered on\_\_\_\_to\_\_\_\_at\_\_\_\_ ,  
with a certified copy of this judgment.

UNITED STATES MARSHAL

By:\_\_\_\_\_

Deputy U.S. Marshal

### SUPERVISED RELEASE

If released from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years**, as to Counts 1, 4, 6, 13, 15, 16, 19, 22, 23 and 24. He shall be placed on concurrent terms of 5 years supervised release as to Counts 2 and 3, as well as a concurrent term of 1 years supervised release as to Count 5.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

**The defendant shall also comply with the additional conditions on the attached page.**

#### **STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

#### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission



of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

#### **CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

#### **Total Assessment Total Fine Total Restitution**

<b>\$1,250.00</b>	<b>\$</b>	<b>\$</b>
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\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

#### **SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

##### **A. Due immediately.**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL  
SECTION 301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

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USDC FLSD 245B (Rev 3/01). Judgment in a  
Criminal Case

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

LUIS MEDINA III,  
A/K/A RAMON LABANINO

JUDGMENT IN A CRIMINAL CASE (For Offenses  
Committed On or After November 1, 1987)

Case Number: 1:98cr0721-002

Counsel For Defendant: William Norris, Esq.

Counsel For The United States: Caroline Heck  
Miller, John Kastranakes, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 2, 9, 11,  
12, 14, 13, 25, and 26 of the Second Superseding  
Indictment.

ACCORDINGLY, the court has adjudicated that the  
defendant is guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794 (c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18 USC § 1546(a)	Fraud and misuse of documents	09/12/1998	9, 11
18 USC § 1542	False statement in a passport application	02/06/1996	10
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	12

18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	14,16, 25, and 26
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The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. xxx-xx-xxxx

Date of Imposition of Sentence:

December 13, 2001

Defendant's Date of Birth: 06/09/1963

Deft's U.S. Marshal No .: 58734-004

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Defendant's Mailing Address:

FDC -33 NE Fourth Street

Miami, FL 33132

Defendant's Residence Address :

FDC -33 NE Fourth Street

Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 19, 2001

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life as to Count 2; It is further ordered** that the defendant shall be imprisoned for 60 months as to Count 1, 36 months as to Count 12, and 120 months as to Counts 9, 10, 11, 14, 16, 25, and 26. These counts shall run concurrently with one another and concurrently with the sentences imposed as to Count 2.

The defendant is remanded to the custody of the United States Marshal.

### RETURN

I have executed this judgment as follows:

---

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_ ,  
with a certified copy of this judgment.

UNITED STATES MARSHAL



By: \_\_\_\_\_

Deputy U.S. Marshal

### **SUPERVISED RELEASE**

If released from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years**, as to Counts 1, 9, 10, 11, 14, 16, 25 and 26. He shall be placed on concurrent terms of **5 years** supervised release as to Count 2, as well as a concurrent term of **1 year** supervised releases as to Count 12.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the

commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

**The defendant shall also comply with the additional conditions on the attached page.**

**STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

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6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of

a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

#### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of

probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

### CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
\$950.00	\$	\$

\*Findings for the total amount of losses are required under Chapters 109A , 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

#### A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court , the probation officer, or the United States attorney .

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL  
SECTION 301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.



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USDC FLSD 245b (Rev 3/01). Judgment in a  
Criminal Case

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

RENE GONZALEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses  
Committed On or After November 1, 1987)

Case Number: 1:98cr0721-003

Counsel For Defendant: Philip Horowitz, Esq.

Counsel For The United States: Caroline Heck  
Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1 and 15 of  
the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the  
defendant is guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	15

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 592-04-7723

Date of Imposition of Sentence:

December 14, 2001

Defendant's Date of Birth: 08/13/1956

Def't's U.S. Marshal No. : 58738-004

Defendant's Mailing Address:

FDC -33 NE Fourth Street

Miami, FL 33132

Defendant's Residence Address :

FDC -33 NE Fourth Street

Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 19, 2001

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **10 years** as to Count 15 and **5 years** as to Count 1 to run consecutively.

The defendant is remanded to the custody of the United States Marshal.

### RETURN

I have executed this judgment as follows:

---

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Defendant delivered on\_\_\_\_\_to\_\_\_\_\_at\_\_\_\_\_ ,  
with a certified copy of this judgment.

UNITED STATES MARSHAL

By:\_\_\_\_\_

Deputy U.S. Marshal

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years**, as to Counts 1 and 15.

The defendant shall report to the probation office in the district to which the defendant is released within 48 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised

release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

**The defendant shall also comply with the additional conditions on the attached page.**

#### STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of



a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

#### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

It is further ordered that the defendant file accurate income tax returns for the prosecution years and to

pay all taxes, interest and penalties due and owing to him by the Internal Revenue Service.

The defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, organized crime figures are known to be or frequent.

### CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

#### **Total Assessment Total Fine Total Restitution**

<b>\$200.00</b>	<b>\$</b>	<b>\$</b>
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\*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

#### **A. Due immediately.**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment<sup>+</sup>/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL  
SECTION 301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

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USDC FLSD 245b (Rev 3/01). Judgment in a  
Criminal Case

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ANTONIO GUERRERO

JUDGMENT IN A CRIMINAL CASE (For Offenses  
Committed On or After November 1, 1987)

Case Number: 1:98cr0721-004

Counsel For Defendant: Jack Blumenfeld, Esq.

Counsel For The United States: Caroline Heck  
Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Patricia Saunders

The defendant was found guilty on Count 1, 2, and 16  
of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the  
defendant is guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 794(c)	Conspiracy to gather and transmit national defense information	09/12/1998	2
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	16

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 592-19-6042

Date of Imposition of Sentence:

December 27, 2001

Defendant's Date of Birth: 10/16/1958

Def't's U.S. Marshal No. : 58741-004

Defendant's Mailing Address:

Federal Detention Center 33 NE 4<sup>th</sup> Street

Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 31, 2001

#### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **Life as to count 2; 5 years as to each**



**of Counts 1 and 16** to run concurrently.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this judgment as follows:

\_\_\_\_\_  
Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_ ,  
with a certified copy of this judgment.

**UNITED STATES MARSHAL**

By: \_\_\_\_\_

Deputy U.S. Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years at to Count 2 and 3 years as to each of Counts 1 and 16 to run concurrently.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

**The defendant shall also comply with the additional conditions on the attached page.**

#### STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

#### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the U.S. Probation Officer. Further, the defendant shall provide documentation, including but not limited to, pay stubs, contractual agreements, W-2 Wage and

Earnings Statements, and any other documents requested by the U.S. Probation Office.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

The defendant is prohibited from associating with or visiting specific places where individuals or groups such as terrorists, members of organizations advocating violence, organized crime figures are known to be or frequent.

#### CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

#### **Total Assessment Total Fine Total Restitution**

**\$300.00                      \$                      \$**

\*Findings for the total amount of fines are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

#### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the

period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL  
SECTION 301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.



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USDC FLSD 245b (Rev 3/01). Judgment in a  
Criminal Case

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

RUBEN CAMPA  
A/K/A FERNANDO GONZALEZ

JUDGMENT IN A CRIMINAL CASE (For Offenses  
Committed On or After November 1, 1987)

Case Number: 1:98cr0721-005

Counsel For Defendant: Joaquin Mendez, AAFP

Counsel For The United States: Caroline Heck  
Miller, John Kastranakes, David Buckner, AUSA's

Court Reporter: Richard Kaufman

The defendant was found guilty on Count 1, 7, 8, 16,  
and 17 of the Second Superseding Indictment.

ACCORDINGLY, the court has adjudicated that the  
defendant is guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>DATE OFFENSE CONCLUDED</u>	<u>COUNT</u>
18 USC § 371	Conspiracy to commit an offense against the United States	09/12/1998	1
18 USC § 1546(a)	Fraud and misuse of documents	09/12/1998	7
18 USC § 1028(a)(3)	Possession with intent to use five or more fraudulent identification documents	09/12/1998	8
18 USC § 951	Acting as an agent of a foreign government without prior notification to the Attorney General	09/12/1998	16 & 17

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 240-77-4930

Date of Imposition of Sentence:

December 18, 2001

Defendant's Date of Birth: 08/18/1963

Deft's U.S. Marshal No.: 58733-004

Defendant's Mailing Address:

FDC 33 NE Fourth Street

Miami, FL 33132

/s/JOAN A. LENARD

United States District Judge

December 19, 2001

#### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months as to Count 1 and 48 months

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as to Count 7 to run consecutively; 36 months as to Count 8 to run concurrently; 120 months as to each of Counts 16 & 17 to run concurrently with each other and to run consecutively with Counts 1 & 7.

The defendant is remanded to the custody of the United States Marshal.

## RETURN

I have executed this judgment as follows:

\_\_\_\_\_  
Defendant delivered on \_\_\_\_ to \_\_\_\_ at \_\_\_\_\_ ,  
with a certified copy of this judgment.

UNITED STATES MARSHAL

By: \_\_\_\_\_

Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for concurrent terms of **3 years as to Counts 1, 17, 16, and 17; 1 year as to count 8 to run concurrently.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

**The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

**The defendant shall also comply with the additional conditions on the attached page.**

#### STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;



10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

#### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to

the custody of the Immigration and Naturalization Service for removal proceedings consistent with the Immigration and Nationality Act.

If removed or if the defendant voluntarily leaves the United States, the defendant shall not reenter the United States without the express written permission of the Attorney General of the United States or his authorized representative. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while he/she is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he/she is to report to the nearest U.S. Probation Office within 48 hours of his arrival.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

### CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

#### **Total Assessment   Total Fine   Total Restitution**

<b>\$500.00</b>	<b>\$</b>	<b>\$</b>
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\*Findings for the total amount of fines are required under Chapters 109A, 110, 110A, and 113A of Title 18 United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

### SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE ATTN: FINANCIAL  
SECTION 301 N. MIAMI AVENUE, ROOM 150  
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

401a

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 01-17176-BB

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
versus  
RUBEN CAMPA,  
a.k.a. John Doe 3,  
a.k.a. Vicky,  
a.k.a. Camilo,  
a.k.a. Oscar,  
RENE GONZALEZ,  
a.k.a. Iselin,  
a.k.a. Castor,  
GERARDO HERNANDEZ,  
a.k.a. Giro,  
a.k.a. Manuel Viramontez,  
a.k.a. John Doe 1,  
a.k.a. Manuel Viramontes,  
LUIS MEDINA,  
a.k.a. Oso,  
a.k.a. Johnny,  
a.k.a. Allan,  
a.k.a. John Doe 2,  
ANTONIO GUERRERO,  
a.k.a. Rolando Gonzalez-Diaz,  
a.k.a. Lorient,  
Defendants-Appellants.

No. 03-11087-BB

402a

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

versus

GERARDO HERNANDEZ,  
a.k.a. Giro, a.k.a. Manuel Viramontez,  
a.k.a. John Doe 1, a.k.a. Manuel Viramontes,  
LUIS MEDINA,  
a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan,  
a.k.a. John Doe 2,  
RENE GONZALEZ,  
a.k.a. Iselin, a.k.a. Castor,  
ANTONIO GUERRERO,  
a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,  
RUBEN CAMPA,  
a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a.  
Oscar,  
Defendants-Appellants.

On Appeal from the United States District Court for  
the  
Southern District of Florida

[September 2, 2008]

**ON PETITION(S) FOR REHEARING AND  
PETITION(S) FOR REHEARING EN BANC**

Before: BIRCH, PRYOR and KRAVITCH, Circuit  
Judges.

**PER CURIAM:**

For Appellant Gerardo Hernandez the Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

403a

Federal Rules of Appellate Procedure), the Petition(s)  
for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

ORD-42



404a

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 01-17176-BB

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

versus

RUBEN CAMPA,  
a.k.a. John Doe 3,

a.k.a. Vicky,  
a.k.a. Camilo,

a.k.a. Oscar,  
RENE GONZALEZ,

a.k.a. Iselin,  
a.k.a. Castor,

GERARDO HERNANDEZ,  
a.k.a. Giro,

a.k.a. Manuel Viramontez,  
a.k.a. John Doe 1,

a.k.a. Manuel Viramontes,  
LUIS MEDINA,

a.k.a. Oso,  
a.k.a. Johnny,

a.k.a. Allan,  
a.k.a. John Doe 2,

ANTONIO GUERRERO,  
a.k.a. Rolando Gonzalez-Diaz,

a.k.a. Lorient,  
Defendants-Appellants.

405a

No. 03-11087-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARDO HERNANDEZ,

a.k.a. Giro, a.k.a. Manuel Viramontez,

a.k.a. John Doe 1, a.k.a. Manuel Viramontes,

LUIS MEDINA,

a.k.a. Oso, a.k.a. Johnny, a.k.a. Allan,

a.k.a. John Doe 2,

RENE GONZALEZ,

a.k.a. Iselin, a.k.a. Castor,

ANTONIO GUERRERO,

a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,

RUBEN CAMPA,

a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo, a.k.a.

Oscar,

Defendants-Appellants.

On Appeal from the United States District Court for  
the

Southern District of Florida

[September 2, 2008]

**ON PETITION(S) FOR REHEARING AND  
PETITION(S) FOR REHEARING EN BANC**

Before: BIRCH, PRYOR and KRAVITCH, Circuit  
Judges.

PER CURIAM:

For Appellants Campa, Gonzalez, Medina and  
Guerrero the Petition(s) for Rehearing are DENIED  
and no Judge in regular active service on the Court

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having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE  
ORD-42

UNITED STATES COURT OF APPEALS,  
ELEVENTH CIRCUIT.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Ruben CAMPA, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a.  
Camilo, a.k.a. Oscar, Rene Gonzalez, a.k.a. Iselin,  
a.k.a. Castor, Gerardo Hernandez, a.k.a. Giro, a.k.a.  
Manuel Viramontez, a.k.a. John Doe 1, a.k.a. Manuel  
Viramontes, Luis Medina, a.k.a. Oso, a.k.a. Johnny,  
a.k.a. Allan, a.k.a. John Doe 2, Antonio Guerrero,  
a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,  
Defendants-Appellants.

United States of America, Plaintiff-Appellee,  
v.

Gerardo Hernandez, a.k.a. Giro, a.k.a. Manuel  
Viramontez, a.k.a. John Doe 1, a.k.a. Manuel  
Viramontes, Luis Medina, a.k.a. Oso, a.k.a. Johnny,  
a.k.a. Allan, a.k.a. John Doe 2, Rene Gonzalez, a.k.a.  
Iselin, a.k.a. Castor, Antonio Guerrero, a.k.a.  
Rolando Gonzalez-Diaz, a.k.a. Lorient, Ruben  
Campa, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a. Camilo,  
a.k.a. Oscar, Defendants-Appellants.  
Nos. 01-17176, 03-11087.

Oct. 31, 2005.

Appeals from the United States District Court for the  
Southern District of Florida (No. 98-00721-CR-JAL);

Joan A. Lenard, Judge.

(Opinion Aug. 9, 2005, 419 F.3d 1219, 11th Cir.2005)

Before EDMONDSON, Chief Judge, and TJOFLAT,  
ANDERSON, BIRCH, DUBINA, BLACK, CARNES,  
BARKETT, HULL, MARCUS, WILSON and PRYOR,  
Circuit Judges<sup>10</sup>

BY THE COURT:

A member of this Court in active service having  
requested a poll on the suggestion of rehearing en  
banc and a majority of the judges in this Court in  
active service having voted in favor of granting a  
rehearing en banc,

IT IS ORDERED that the above causes shall be  
reheard by this court en banc. The previous panel's  
opinion is hereby VACATED.

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<sup>10</sup> Senior U.S. Circuit Judge Phyllis A. Kravitch may  
elect to participate in further proceedings in these  
matters pursuant to 28 U.S.C. § 46(c).

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

v.

GERARDO HERNANDEZ,  
a/k/a MANUEL VIRAMONTEZ, ET AL.,  
Defendants.

Docket No.  
98-721-CR-LENARD  
Miami, Florida

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JOAN A.  
LENARD AND A JURY

\* \* \* \*

[535] personally did not conduct the counseling and on the issue of whether she attended services, this is exactly what I was concerned about. The mere fact of having attended a mass not become a benchmark here. There were masses after the shoot-down all over town and numerous people attended and I think we could all take notice of the

fact even in a non-public situation, people go to funeral services and perform those social acts without being tainted by irretrievable prejudice. As the Court said yesterday, it is a question of the totality of the circumstances other than the mere fact of having attended a service. To say that this individual should be stricken for cause in light of her statement she did not have strong feelings about this matter, would be to preempt the process that has been prescribed here where these matters were supposed to be employed on Thursday where we will go into them in greater detail.

If she is not stricken for cause and comes back on Thursday, I am sure this is a matter the Court will go into with her and that is the appropriate setting.

MR. McKENNA: It is a Catholic school. She is the principal of the school. She is almost like a priest herself. She teaches religion to these students, she goes to the home, prays and gives her condolences. She is too close to the victims.

THE COURT: I will deny the challenge for cause

\* \* \* \*

[625] it for tomorrow and we will continue on Friday and I am not sure we will complete the individual voir dire by Friday but certainly by Monday we should be at least close to completing it.

Thus far I think it is going well.



MS. MILLER: Judge, you have distributed to us the questions that you will be using tomorrow, but at the time you said they were not quite in final form. Would it be possible for us to get those questions in final form?

THE COURT: What I had done previously when we were working on the questions I gave you a rough draft. I have now completed the questions, made some changes as to the wording, but the thrust of the questions are the same as to what we went over in the pretrial conference.

I can tell you, I have been getting a tremendous amount of requests from the media for those particular questions and I am sure you know I have not released it to them and telling them it is not public record. I don't think we want to see those printed or indicated in the news segment so jurors would hear those questions prior to the time they are posed to them by the Court.

MS. MILLER: I certainly have no objection to receiving them under seal if that would give the Court some more comfort but I was hoping if we could have them tonight to take a look at the questions.

\* \* \* \*

[1026] people would be criticizing me being in this jury either way?

Q. Would you be able to put aside whatever concerns you have about that?

A. Yes.

Q. And sit and listen to the evidence in this case and be fair to both the prosecution and the defense?

A. I think it would be difficult.

Q. How so?

A. This is a high profile case. When I left the courtroom, the media were outside for this.

Q. Did anyone try to talk to you from the media?

A. I was videotaped, but no one tried to talk to me. I put my badge into my pocket. They were out there for this, I could tell.

Q. Would you be able to put aside whatever concerns you have about any verdict that may be rendered by the jury and render a verdict if that is what the jury wishes to do based on the evidence presented at trial and for no other reason?

A. You have to repeat that question again.

Q. Would you be able to put aside whatever concerns you have about how a verdict may be received in your community and make a decision on a verdict based upon the evidence presented at trial and for no other reason?

A. I definitely would be thinking about the fact what would happen when we render this verdict and what would people say.

\* \* \* \*

[1492] A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N.

(Open court.)

THE COURT: United States of America versus Gerardo Hernandez, et al. Case Number 98-721.

Would counsel state their appearances.

(All parties present.)

THE COURT: We are ready to begin the peremptory strike portion of the voir dire process. We will be utilizing the numbers as the jury panel members appear on the list 1 through 49. The government is odd, defendant is even. The government will exercise their peremptory first on odd numbered jurors and defendant on even numbered jurors. The government has 11 challenges, the defendants 18 and two additional each side for alternates.

MR. McKENNA: May we stay seated?

THE COURT: Yes.

THE COURT: No back striking.

MR. McKENNA: The government will exercise on odd and we will exercise on even and you will

THE COURT: What will happen, I will say juror number 1. The government will exercise a peremptory strike if they have one. If they say accept, which is the preferred terminology by Richard for the record, then it goes to the [1493] defense and you will either strike or accept. On juror number 2, you will exercise a peremptory strike if you wish. If you say strike, that person is gone. If you say accept, then it goes to the government to have the opportunity to exercise a peremptory.

MR. KASTRENAKES: Since we have five defense attorneys, I assume by virtue of their

agreement they are agreeing to pool their strikes and have one person announce?

MR. McKENNA: That is true.

THE COURT: That is what I assumed would be happening.

Now we are ready.

Juror number 1 to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Accept.

THE COURT: Juror number 2.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: Let's make sure we all have the same list.

Are we all working off the same list?

MR. McKENNA: We checked with Lisa before.

THE COURT: Did you check mine?

THE CLERK: No.

THE COURT: Check mine.

(Interruption.)

THE COURT: No one has any objection to Lisa's [1494] official list?

MR. McKENNA: No, Your Honor.

MR. KASTRENAKES: Correct.

THE COURT: We are up to juror number 3 to the government.

MR. McKENNA: When you get to the number, would you say the name so we don't have any mistakes at all?

THE COURT: Sure.

Juror number one is Gil Page, juror number two David Buker. Juror number three Steven Gair.

MR. KASTRENAKES: We exercise a peremptory challenge.

THE COURT: The government strikes.

Juror number 4 to the defense.

MR. McKENNA: Strike.

THE COURT: Juror number 5, Diana Barnes to the government.

MR. KASTRENAKES: Accept.

THE COURT: To the defense.

MR. McKENNA: Accept.

THE COURT: That is juror number 3.

Juror number 6, Marco Barahona to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: The government strikes.

Juror number 7, Paolercio to the government.

[1495] MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: Juror number 8, Laverne Greene to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 9, Ileana Briganti, to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 10, John Gomez, to the defense.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 11, Sonia Portalatin.

MR. KASTRENAKES: Accept.

MR. McKENNA: May we have one moment?

THE COURT: Sure.

(Interruption.)

MR. McKENNA: Defense accepts.

THE COURT: She is juror number four.

Juror number 12, Lazaro Barreiro to the defense.

MR. McKENNA: Strike.

THE COURT: Juror number 13, Belkis Briceno-Simmons to the government.

MR. KASTRENAKES: Accept.

[1496] MR. McKENNA: Defense strikes.

THE COURT: Juror number 14, Omaira Garcia to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We will accept Ms. Garcia.

THE COURT: She is juror number five.

Juror number 15, Michele Peterson to the government.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 16, Elthea Peeples to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We accept.

THE COURT: Juror number 6.

Juror number 17, Louise Cromarti.

MR. KASTRENAKES: Strike.

MR. McKENNA: May we have a moment, please?

THE COURT: Sure.

(Interruption.)

THE COURT: Number 18, Wilfred Loperena.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: That is juror number seven.

Juror number 19, Kenneth McCollum to the government.

MR. KASTRENAKES: Strike.

MR. McKENNA: Your Honor, at this time we would like [1497] to move under Batson for the government to give some racially neutral reason for that strike. They have exercised four out of their six challenges on Afro-Americans, and I would point out the last juror that was struck, we looked at our notes. Her name was Louise Cromartie and there was absolutely nothing objectionable about Ms. Cromartie. She was an elderly woman who had never served on a jury before, had absolutely no baggage in her background and we thought we would wait to see if there was any further pattern to the



government's use of their challenges and it appears there is a pattern.

Mr. McCollum actually is employed in the law enforcement field. He is a correctional officer at Everglades Correctional Institute and there was nothing objectionable about him, Your Honor.

At this time we would ask you request the government give some racially neutral reason for their use of the peremptory challenge.

MR. KASTRENAKES: Your Honor, in response --

MR. McKENNA: And Ms. Cromartie also because she was the last one and we looked at her notes and there was nothing in her that we could decipher was a reason for exercising a peremptory that made her objectionable in some way.

THE COURT: Can you give me one moment and let me locate my notes, please.

Yes, Mr. Kastrenakes.

[1498] MR. KASTRENAKES: The defense has failed to establish a pattern. The United States has agreed to the first three jurors, two African-Americans. It is true we have struck four African-Americans. We have sat two. There is no pattern here.

THE COURT: Is that the standard under Batson?

MR. KASTRENAKES: First they have to establish some type of pattern to your satisfaction that you would make a further inquiry into our reasons.

THE COURT: I would like you to state the reasons for both Cromartie and McCollum, race neutral reasons.

MR. KASTRENAKES: On Ms. Cromartie, there were three things we had identified about her why we did not want her sitting as a juror. Number one was her stated disagreement with the United States policy with respect to the immigration of Cubans versus other ethnic groups. She was upset about that.

The second thing was, her answer concerning her travel to Cuba. She indicated she traveled to Cuba in the early years of Fidel Castro's regime which unlike anybody else who has traveled to Cuba was of much more vintage and when the policy concerning travel between United States and Cuba was relaxed.

Third, was her demeanor how she sat in the box during the second phase. The Court began its dialogue with her and offered an apology for having had her sit out the day before and she didn't even respond. She sat with her arms folded [1499] staring away from the Court and we were concerned about that.

Do you want me to continue with Ms. McCollum?

THE COURT: Is there any response from the defense?

MR. McKENNA: I think the argument they struck her because she was upset about the immigration policy fails because they did not strike Mr. Paolercio and he was outspoken about his disgust with the immigration policy and the fact he can't

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speak English in his own city and things of that nature. I don't buy that argument. There were many people they didn't strike that they already passed over that have strong views about that.

I also don't think Ms. Cromartie had strong views on immigration. She didn't really have strong views on anything. She was an extremely soft spoken elderly black woman that didn't seem to be upset or offended by any of the questions, answered the questions. I didn't notice any kind of a demeanor problem with that prospective juror at all. I thought she was a sweet elderly lady who answered your questions and we were through with her very quickly.

There were many people that traveled to Cuba and the government hasn't moved to challenge them. All the Cubans traveled to Cuba. I don't think they have made a good argument specially when contrast the situation with Mr. Paolercio who was so outspoken about his views.

THE COURT: I will deny the Batson challenge [1500] concerning Louise Cromartie. I do find the race neutral reasons given by the government to be sufficient and specifically as to the apology that the Court gave regarding having to bring Ms. Cromartie back, she was the one juror who did not acknowledge or respond to the apology whatsoever. She just looked at me. She gave no response, no acknowledgement of

it whatsoever, and I do find the other reasons given by the government to be race neutral.

Mr. McCollum.

MR. KASTRENAKES: He is a corrections officer and I guess the defense's argument he should

be somebody the government would want. We do not want somebody intimately familiar with the prison system. We are calling witnesses who are incarcerated and we do not want a person who guards persons on this jury.

MR. McKENNA: I find that argument interesting because when we dealt with the issue of the gentleman who was from the Federal Detention Center, they had no objection and they resisted our attempt I believe to remove him for cause.

MR. KASTRENAKES: He didn't guard anybody. He was a clerk downstairs.

MR. McKENNA: I am not finished.

The point is, when we had somebody that knew the defendants and worked at the Federal Detention Center, obviously familiar with prisoners and movement within the [1501] prison obviously far more than Mr. McCollum, they didn't have a problem with him. Now they say they have a problem with Mr. McCollum? It is another way of making an argument not on all fours.

THE COURT: I will deny the Batson challenge on Mr. McCollum. The government has stated a race neutral reason for exercising their peremptory strike against him and I find it to be sufficient under the Batson decision.

Let's continue. Morton Lucoff to the defense?

MR. McKENNA: Defense accepts.

MR. KASTRENAKES: The United States strikes Mr. Lucoff.

THE COURT: Number 21, Florentina McCain to the government.

MR. KASTRENAKES: We accept Ms. McCain.

THE COURT: To the defense.

MR. McKENNA: Defense strikes.

THE COURT: Number 22, John McGlamery to the defense.

MR. McKENNA: Defense strikes.

THE COURT: Number 23, Richard Campbell to the government.

MR. KASTRENAKES: The United States accepts.

MR. McKENNA: Defense accepts.

THE COURT: That is juror number 8.

Number 24, Queen Lawyer to the defense.

[1502] MR. McKENNA: Defense accepts.

MR. KASTRENAKES: The United States strikes Ms. Lawyer.

MR. HOROWITZ: Same objection, Your Honor.

MR. McKENNA: That is now five out of eight and the last three in a row.

THE COURT: Would you give your reason for striking Queen Lawyer?

MR. KASTRENAKES: Her son was convicted of armed robbery in 1996. He was not treated fairly, is the main reason.

MR. NORRIS: Judge, two things. Just so the record is clear since the record is race neutral; the government's two prior strikes of black jurors were of juror number 6, Barahona and Lavern Greene, number 8. The record is clear, these people have

relatives including children who have prison records. This is a strike to assign that as a reason it is really a make weight argument and we think it is racially motivated.

MR. KASTRENAKES: Counsel inaccurately characterized Mr. Barahona of African decent, he is not.

MR. HOROWITZ: Your Honor, first of all the last two jurors, Ms. Lawyer and mr. McCollum are the typical type of jurors the defense would normally strike, a correction officer and a lady whose -

[1503] THE COURT: I already ruled on that.

MR. HOROWITZ: Her sister is an FBI officer and her cousin is a parole officer in Miami. These are jurors that we believe will be fair that the government has stricken for a racially motivated reason. That is the nature of our challenge.

MR. KASTRENAKES: Ms. Lawyer I could go further. She actually came out and said that her son went to trial and even despite the fact -- side bar she was talking about all the witness identifications. The jury made a mistake. She has no faith in the jury system based on her son's conviction.

The other black juror we sat, Mr. Page, did have a family member that was prosecuted and treated fairly. We draw a huge distinction between a person's ability to trust the jury system and a person who does not trust the jury system. Ms. Lawyer clearly indicated the jury in her son's case made a mistake and she was not happy about it and he was not treated fairly. We don't want that kind of person on a jury.

THE COURT: I will deny the Batson challenge concerning Queen Lawyer. The Court finds that the government has stated a race neutral reason, that Ms. Lawyer did indicate her unhappiness with the criminal justice system because of her son's experience and I do not find it is a racially motivated exercise of peremptory to strike. The Batson challenge is denied.

[1504] Let's go forward.

Juror number 25, Jess Lawhorn, Jr., to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: Juror number 26, Barbara Pareira to the defense.

MR. McKENNA: Defense strikes.

THE COURT: How many challenges has each side exercised?

THE CLERK: The government 9 and the defense 10.

MR. KASTRENAKES: We have seated how many jurors?

THE COURT: Eight.

Juror number 27 to the government, Angel De La O to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 28 Lilliam Lopez to the defense.

MR. McKENNA: Defense strikes.



THE COURT: Juror number 29, Juanito Millado, to the government.

MR. KASTRENAKES: Can we have one moment?

THE COURT: Sure.

(Interruption.)

THE COURT: To the government, juror number 29.

[1505] MR. KASTRENAKES: Accept.

MR. McKENNA: Accept.

THE COURT: That is juror number nine.

Juror number 30, Migdalia Cento to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Accept.

THE COURT: Juror number 31, Miguel Hernandez to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 32, Hugo Arroyo to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: Strike.

THE COURT: Juror number 33, Leilani Triana to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Defense strikes.

THE COURT: Juror number 34, Sergio Herran to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: We will accept Mr. Herran.

THE COURT: That is juror number 11.

Juror number 35, Rosa Hernandez to the government.

MR. KASTRENAKES: Accept.

[1506] MR. McKENNA: Strike.

THE COURT: Juror number 36 Debra Vernon to the defense.

MR. McKENNA: Accept.

MR. KASTRENAKES: One moment, Your Honor

(Interruption.)

I guess we have a jury. We will accept Ms. Vernon.

THE COURT: Both sides tender the jury?

MR. KASTRENAKES: The government tenders the jury.

MR. McKENNA: The defense tenders the jury.

THE COURT: That is the jury.

Alternates. 37, Haydee Duarte to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: Strike.

THE COURT: 38, Wanda Thomas to the government.

MR. KASTRENAKES: The government strikes.

MR. McKENNA: We renew our Batson challenge.

MR. KASTRENAKES: Your Honor, the first thing that we had discussed with respect to her as a potential witness was her body language and demeanor in the box. The entire time she had her arms crossed and did not appear to be happy with the

process and we formed a poor impression of a potential juror as a result of that. She also gave basically one word answers to every question asked by the Court and we were concerned about her, [1507] although this is not the primary reason, we were concerned about her ability to state any opinion on any matter whatsoever.

Finally, Judge, she indicated she was from Panama and only in the context of this case does that cause us a concern. One of the defendants in this case Antonio Guerrero has a wife and child and travels to Panama frequently. The documents will come out he traveled to Panama and he has a wife and child in that country and we were concerned about that.

THE COURT: She was born in Panama, is that what you said?

MR. KASTRENAKES: Yes. She answered that question she was born in Panama.

THE COURT: Anything further?

MR. McKENNA: I can't say that I noticed any demeanor problems with Ms. Thomas. The fact she had no opinion on certain issues, there were many jurors that the government passed over that had no opinions. The government passed over Omaira Garcia. Despite the fact she had Cuban

relatives -- she had no Cuban relatives. She had no opinion on Elian or anything to do with the government of Cuba. The same with Migdalia Cento the government passed over. She had no opinion about Elian, no opinion about the Government of Cuba. The government passed over many of these people and really to say she crossed her arms that means they don't have a reason. It [1508] is desperation when they make that kind of an argument.

The argument about Panama, the fact she was born there, I don't think there is any evidence she lived there recently or a long time. I don't think that will exclude her merely because some defendant took a trip or traveled there or had a wife from that country. I don't think that is a basis at all, Your Honor.

THE COURT: I find that the government has stated race neutral reasons. You may not agree with them but I do find they are sufficient and that there is not a motivation on the government's part to exclude this juror as an alternate because of her race. Therefore, the Batson challenge is denied.

Let's go forward.

Juror number 39, Eugene Yagle to the government.

MR. KASTRENAKES: Accept.

MR. McKENNA: May we have a moment?

THE COURT: Yes.

THE CLERK: They both have one challenge left.

MR. McKENNA: 39, we accept.

THE COURT: That is alternate number one.

Number 40, Louise Hernandez to the defense.

MR. McKENNA: Defense strikes, Your Honor.

THE COURT: Those are your two strikes.

MR. KASTRENAKES: The United States is concerned in this case the defense has systematically struck every [1509] individual born in Cuba. Of Cuban decent. Mr. Luis Hernandez of Cuban decent answered the questions with respect to any other inquiry without any hesitation, without any problem and I don't see any reason that would be race neutral to strike Mr. Luis Hernandez.

MR. McKENNA: I have some reasons.

MR. BLUMENFELD: I do too.

With respect to Mr. Hernandez born in Miami Beach, when you asked him about whether he would believe a member of the communist party of Cuba, he questioned whether he would believe them. He said he would listen but he didn't know if he would believe them. Considering who the defense witnesses are in this case, that is clearly a race neutral reason for Mr. Hernandez.

In addition to that, his manner of dress, the way he came to Court --

THE COURT: That is what he ultimately ended up saying? He said he would listen but he didn't know if he would believe them.

MR. BLUMENFELD: He would listen but didn't know if he would believe them.

Our race neutral reason is, he had doubts in his mind --

THE COURT: That wasn't necessarily the ultimate answer when questioned by the Court but he said it at one [1510] point?

MR. BLUMENFELD: Yes. He made the statement he wouldn't know whether he would believe a member of the communist party. He would listen when you rehabilitated him but it doesn't mean I would believe him. Based on the fact he would have a question whether he believed some of the communist party of Cuba, we may have some witnesses and we would strike him.

Plus when he came in here he was wearing a baseball satin jacket. He sat there slumped and indicated to us he didn't give enough importance to this case. Based on those reasons is why we struck him.

MR. McKENNA: In addition to that, he said his father's family was in Cuba and when asked whether he had an opinion about the Government of Cuba, he said no. I found it in contrast to the majority of people that have some family in Cuba that had an opinion about the Government of Cuba. I found that to be an indication of a possible lack of candor, that he didn't have any view at all of the Government of Cuba. That was an additional reason.

THE COURT: The government's challenge is based on what, what is your position, that is being challenged by them because of national origin?

MR. KASTRENAKES: There is a pattern that developed in their striking. In looking at all of their strikes, they [1511] struck anybody that had a connection with Cuba through family relations and while many of those people gave reasons during their

questioning, the United States felt looking at Mr. Hernandez' examination, the reasons they gave for striking them didn't exist.

THE COURT: Based upon the reasons stated by the defendants concerning number one, demeanor and number two his original answers versus his ultimate answers when further questioned by the Court, the Court finds it is not sufficient for a Batson challenge based upon national origin. That there are national origin neutral reasons for his exclusion and the peremptory strike is properly executed by the defense.

They are out of strikes for the alternates.

Odornia Homuska to the government?

MR. KASTRENAKES: We strike.

MR. McKENNA: We renew our Batson challenge.

THE COURT: Let me hear your reasons.

MR. KASTRENAKES: There are several with her. It does not rise to a level for cause. Her language difficulty was evident with respect to the examination from the Court and her responses. This case involves the submission of an incredible amount of documents in the English language and we were concerned about her ability to digest that information.

Secondly, Your Honor, her demeanor when asked questions from the Court caused the United States concern. The [1512] Court asked a question, number 16, concerning her opinion on the Elian Gonzalez matter. As the Court will recall, her response was a laugh. She laughed out loud. The



Court followed up and asked are you sure about that and she said no, I don't and she laughed. You asked her is she sure and she answered, yes.

It appeared to us she was annoyed with the further inquiry of the Court or the question that the Court may have asked her why she may have laughed in response to that question.

It is either indicative of two things, one, she doesn't understand what the Court is asking her and reason number two, she is unhappy about questions on her personal opinions and we have a concern in that regard. Overridingly, our main concern with respect to her was her inability from a peremptory point of view to digest the voluminous information we would be introducing.

THE COURT: I will deny the Batson challenge. The Court finds the government has stated rationally neutral reasons for their determination to exercise a peremptory strike concerning Homuska, that being both her demeanor and her response to the Elian Gonzalez question and her ability to digest a tremendous amount of documents in English.

Therefore, I find the exercise proper and not a violation of Batson.

[1513] Number 42, Miguel Torroba is alternate number two. Marjorie Hahn is alternate number three and Beverly Holland is alternate number four.

MR. KASTRENAKES: That is what I have.

THE COURT: Let me make sure the record is complete. For the twelve jurors the defendant exercised 15 challenges, the government exercised

nine. Neither side utilized the amount of challenges granted by the Court. The defendant's 18 and the government's 11.

I want to commend both sides for your cooperative efforts as we went through the voir dire process which was, though fairly efficient, was a long process by the number of hours spent. Both sides truly advocated for their clients and their positions and it was a spirit of cooperation and I appreciate that and I hope it will continue, I expect it will continue throughout the trial.

I specially want to commend my chambers staff who worked many, many long hours to make this process and the different stages of this process run as smoothly as it did, Lisa Shelnut and Larry Irons, Robin Godwin. Lisa spent a tremendous amount of hours making sure people were called in here and making sure everything was organized and Richard Kaufman, of course, his magic fingers have worked so well as they always do in making sure these very long hours we put in in an effort to accommodate jurors, that we were able to do so

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[1671] from you on opening statement?

MR. HOROWITZ: Tops, Judge.

THE COURT: On Monday you will be ready with your first witness?

MS. MILLER: Yes, Your Honor.

THE COURT: Any other issues or matters I need to take up at this time?

MS. MILLER: I just had two. They are really housekeeping matters. We spoke about Rule 615 and the defense has invoked the rule on witness sequestration. Just so it is clear on the record, the government also asks that rule be invoked with regard to defense witnesses.

THE COURT: The rule has been invoked. All witnesses are instructed they are not to discuss their testimony among themselves or anyone else save the attorneys involved.

MS. MILLER: The other matter we wanted to put on the record, since we did have some Batson challenges, we did want to make as a matter of record, this jury which has been tendered by the government does include three African-American members of the regular panel and one African-American member in the alternate panel, a percentage of 25 percent.

THE COURT: Any other issues or matters?

MR. MENDEZ: I have a matter, Your Honor. Depending who the government's witnesses are, we will have a large amount of documentary material we need to bring into the courtroom or

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[2691] the government has provided. It is voluminous. There is no question about it. It might be helpful to sit down with the government, perhaps this afternoon, if you can do so, and just have a discovery conference to review some of the material as they were originally produced to you so you are

more familiar and can see exactly how many communications were produced, in what form and I think it would make these side bar conversations certainly more efficient.

I am not faulting anybody. It is voluminous and it is very complicated and I know counsel, everyone here, is working very hard, both the government in their presentation to the jury are very complex matters and defense counsel with their representation in defending their clients to make sure there is a presentation and a defense and everybody is being properly represented and I appreciate that.

MR. McKENNA: The objection I made earlier, I will have those documents for you tomorrow.

THE COURT: There is an issue no one has brought up -- do you want to bring it up?

MS. MILLER: If we are thinking of the same thing. The press will be breathing down my neck. They want those English volumes.

MR. MENDEZ: I thought they were subject to a final ruling on 403, so there is a conditional ruling --

MR. BLUMENFELD: Let me be out of here when you tell

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[7688] MR. McKENNA: It had to do with the boundary of Cuba.

THE COURT: I don't want to get into this.

I will make these findings for the record.

This witness has testified that he relied on the ICAO report for his opinion. Part of his opinion was as questioned by the government, that the shutdown occurred in international waters. The ICAO report considered this radar data along with the American radar data and made certain findings based on that. Mr. McKenna is entitled to question this witness on his opinion and the differences between that opinion and the ICAO report upon which he says he relied and it is for the jury to evaluate his opinion on the same basis under Rule 703 that I allowed the other questioning.

MS. MILLER: It is understood.

THE COURT: The objection is overruled.

(Open court.)

THE COURT: Overruled, you may proceed.

I don't remember if there was a question. I think you will have to start again, Mr. McKenna.

BY MR. McKENNA:

Q. We were talking about the ICAO report and information in the ICAO report about the Cuban radar data for the shutdown on February 24, 1996. This is at 2.35.1.3.

According to the Cuban air defense radar records, one aircraft, N 5485S was first observed at 1439 hours just north [7689] of the 24 north parallel heading west. A second aircraft, N 2506 was observed at 1451 hours, also just north of the 24th parallel and heading west.

These two aircraft were observed on a westerly track before turning south along 08230 west and crossing the 24th north parallel at about 1500 hours.

The third aircraft, N 2456S was first observed at 1500 hours at position 23, 41 north, 082, 087 west, well within the MUD 9 danger area heading south. According to the Cuban radar records, this aircraft penetrated the twelve nautical mile Cuban territorial limit at 1507 hours and continued on a south westerly track until it was shot down in an area about five nautical miles north of Baracoa at 1521 hours.

Further, the report states, N 2506 and N 5485S penetrated the twelve nautical mile limit at about 1517 and 1519 hours respectively. The track of N 5485S continued south until this aircraft was shot down in the same area as the first aircraft. N 2506 turned northeast at about 1520 hours and left Cuban territorial air space at 1524 hours. At 1528 hours, N 2506 turned northwest and crossed the 24th north parallel northbound at 1543 hours at about 08230 west.

Sir, according to the ICAO report, all three aircraft per Cuban radar entered Cuban air space; correct?

MS. MILLER: I object to the form of the question in light of the purpose for which these data are admitted. I [7690] would also ask for the limiting instruction to be given to the jury again.

THE COURT: The question is overruled.

These out of court statements are not coming in for the truth of the matter asserted, but to assist you in evaluating the expert's opinion and testimony.

You may answer the question, sir.

BY THE WITNESS:

A. Yes. According to the Cuban radar.

BY MR. McKENNA:

Q. All three were in the Cuban territory and the two that were shot down were shot down in the Cuban territory?

MS. MILLER: Asked and answered.

MR. McKENNA: I just wanted him to reference it because of the answer.

MS. MILLER: I withdraw my objection.

THE COURT: Go ahead.

BY THE WITNESS:

A. That is correct.

BY MR. McKENNA:

Q. As far as the exact plottings of the shootdown, and this is at page 74, 2.35.31 -- I am sorry, I didn't give you the report. Would you like to have that?

A. I would.

Q. Did data showed that the three aircraft penetrated the [7691] twelve mile nautical limit and two of them were shot down? Cuban territorial air space five to six nautical miles north of Havana. N 2456S at position 2309.4 N 082, 32.6 west and the other aircraft N 5485S at position 2311 on 08234.1 west.

Are those the fixed coordinates that Cuban radar shows according to the ICAO report for the location of the shootdown of the two aircraft?



A. According to this report.

Q. According to this report that relies on the Cuban radar data; correct?

MS. MILLER: Objection. Mischaracterizes.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. Attached to the ICAO report and within the ICAO report are the plots of the Cuban radar data; is that correct?

A. The hand plotted plots; yes.

Q. On a map?

A. That is correct.

Q. It shows the progress of the aircraft and their ultimate location at the time of shootdown; is that correct?

A. According to their radar; correct.

Q. You mentioned a ship called the Tri Liner in the course of your testimony, do you remember that?

A. Yes.

\* \* \* \*

[9005] problem.

MS. MILLER: It should end on page 10.

MR. McKENNA: We will knock out the last couple of pages.

THE COURT: I will instruct the jury they should only turn the pages and we will take out the pages after that.

MR. KASTRENAKES: When he says goodbye.

THE COURT: Okay.

MR. McKENNA: How long did you want to go?

THE COURT: Do you want to stop here?

MR. McKENNA: I think it is a good idea.

THE COURT: Then you can remove the pages for tomorrow.

I was informed yesterday sometimes they have cameras downstairs. Yesterday the cameras were focused on the jurors as they came out of the building and I was informed afterwards by security that was happening. What I would propose today and I didn't -- I came up with a plan B but I didn't want to put it into effect without speaking to you all. Larry has been walking them downstairs afterwards and rather than having them go out the front doors, they could go out what is supposed to be the open part of the tower which has the security gate down, open that and let them go out that way.

MR. KASTRENAKES: Leave it open for me too, Judge.

MR. McKENNA: No objection at all.

\* \* \* \*

[9869] Q. With respect to radar, as a general principle, what radar is better, radar that is fixed closer to an event or further away?

A. Generally closer to the event the better.

Q. In your evaluation of the U.S. radar in this case, what radar was able to track events that were taking place just North of the Cuban coast?

A. The aerostat balloon.

Q. What is the aerostat balloon again?

A. Basically an airborne radar antenna.

Q. Where was it located?

A. Cudjoe Key, Florida.

Q. How far away from Cuba was it?

A. It was roughly 90 miles away from the events.

Q. What about the Cuban radar that recorded the data in this case?

A. It was anywhere from five to twelve miles away.

Q. You have studied the Cuban radar data as well?

A. Yes.

Q. Tell the jury what the radar data you studied was in Cuba?

A. I studied an onionskin that was recorded at the time of the events and I also studied a copy of the onionskin.

Q. How is the onionskin generated?

A. Basically at the time of the events, the events were occurring on a radar scope -

[9870] MR. KASTRENAKES: Objection.

MR. McKENNA: He is giving his opinion. They can ask for the instruction if they want.

MR. KASTRENAKES: This is not his opinion.

MR. McKENNA: It is his opinion.

MR. KASTRENAKES: He is not giving his opinion. He is recounting hearsay events.

THE COURT: Sustained.

Rephrase your question. Then if you wish the instruction you can request the instruction.

BY MR. McKENNA:

Q. First of all, have you incorporated Cuban radar into your opinion where the shoot down took place?

A. Yes.

Q. By the way, do you have an opinion as to where the two aircraft were shot down?

A. Yes.

Q. What is your opinion?

A. Roughly six or eight miles -- in the area of six to eight miles offshore.

Q. Would that be in the Cuban territory?

A. Yes.

Q. In arriving at that opinion, have you relied upon the Cuban radar data?

A. Yes, in part.

[9871] Q. You have relied on many other things too; haven't you?

A. Yes.

Q. We will get to those. We are talking now about the Cuban radar.

Could you go back and tell us --

MR. KASTRENAKES: I would ask for an instruction with respect to that opinion and the conclusion, with respect to the data.

THE COURT: As to the opinion?

MR. KASTRENAKES: As to the data.

MR. McKENNA: I haven't gotten to the data yet.

THE COURT: With respect to the opinion, it is denied.

He is getting to the data.

BY MR. McKENNA:

Q. Can you tell the ladies and gentlemen of the jury how the onionskin was generated?

MR. KASTRENAKES: I have an objection to that.

Hearsay.

THE COURT: The objection is overruled.

These out of court statements are not coming in for the truth of the matter asserted, but to assist you in evaluating the expert's opinion and his testimony.

You may proceed.

BY MR. McKENNA:

Q. When you were in Cuba, were you shown the onionskin?

[9872] A. Yes.

Q. Were you permitted to photograph it?

A. Yes.

MR. KASTRENAKES: Your Honor --

BY MR. McKENNA:

Q. At that time did someone explain to you how the onionskin was generated?

A. Yes.

Q. Who explained it to you?

A. Colonel Capote.

Q. What were you told?

A. The events occurred --

THE COURT: These out of court statements are not coming in for the truth of the matter asserted but to assist you the jury in evaluating the expert's opinion and his testimony.

You may proceed.

BY MR. McKENNA:

Q. What did he explain to you?

A. The events occurred on the radar scope. There was somebody adjacent to the radar scope doing a hand plot on a plexiglas which is consistent with the way hand plots and recording of data was done and before we had a recording capability in the United States.

I saw -- I can't say that it happened on February 24, [1987] but I saw a videotape that Cuba had made where somebody was plotting on a plexiglas --

MR. KASTRENAKES: I have an objection to this.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Confine yourself to what Mr. Capote told you?

A. The events occurred on the radar scope. It was recorded on plexiglas and reproduced on onion skin.

Q. When you say reproduced on onion skin, how did he explain they did that?

A. Put the onionskin on a plexiglas and reproduce it.

Q. What does the onion skin look like?

A. It is kind of brown and it has various lines and colors on it.

Q. Can you see through it?

A. Yes.

Q. You have examined the onion skin?

A. Yes.

Q. Where was it represented the onion skin came from that you examined?

A. It came from the archives.

MR. KASTRENAKES: Objection.

THE COURT: Overruled.

These out of court statements are not coming in for the truth of the matter asserted but to assist the jury in [9874] evaluating the expert's opinion and testimony.

BY MR. McKENNA:

Q. Where did it come from?

A. From a radar Battalion that made it then it came from the archives where it was stored.



Q. Did you examine the onion skin?

A. Yes.

Q. Did it have plots on it?

A. Yes.

Q. Did it have plots on it as to where the shoot down occurred?

A. Yes.

MR. KASTRENAKES: Objection to leading.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. What did the onion skin show as to the location of the shootdown?

A. It had plots of radar, aircraft tracks taken from the radar and it had an indication where the tracks stopped.

Q. Based on your discussion with Colonel Capote, was there an indication what the stop meant?

A. Yes. That was the general area where the aircraft were shot down.

Q. Have you reviewed a transcript of the MIG dialogue with [9875] their control center?

A. Yes, I have reviewed several transcripts.

Q. Have you reviewed -- let me show you what is in evidence right now as Government Exhibit 483 comp.

Is this the MIG transcript you have reviewed?

A. This is one of them.

Q. That is the final one that was introduced into evidence in this case --

MR. KASTRENAKES: Objection, leading.

MR. McKENNA: Just to clear up any confusion, Your Honor.

MR. KASTRENAKES: Objection, leading.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Do you have a copy of the MIG transcript I gave you?

A. Yes.

Q. Would you pull it out.

A. I have it.

Q. Do they appear to be the same transcript?

A. Yes.

Q. Is that the one you relied upon?

A. Yes.

Q. My question is this, Mr. Buchner.

In reviewing the MIG transcript, did you come -- let me direct you to it.

[9876] In reviewing the MIG transcript, did you come across any portion that indicated dialogue between the MIG pilot and the control center regarding marking the spot of the shootdown?

A. Yes.

Q. What does the transcript say? Read that brief portion?

A. It says "mark the spot."

Q. What page?

A. Page 11.

Q. Go ahead?

A. "Mark the spot. We downed him. We are above it now."

Q. Who was the MIG pilot talking to?

A. He was talking to the battle commander in the air defense facility.

Q. Why would the MIG pilot be saying "mark it"?

MR. KASTRENAKES: Objection, calling for speculation.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. You have been qualified as an expert in MIG combat tactics and control. Based upon your knowledge, how are MIGs directed when they are engaged in military activity?

A. They have a ground radar control controlling them.

Q. Do they operate differently than U.S. fighter pilots?

A. They are under much closer control.

Q. When a MIG pilot says to the control center "mark it," [9877] what is he telling the control center to do?

MR. KASTRENAKES: Objection. He is calling for the witness to speculate.

THE COURT: Sustained.

Rephrase your question.

BY MR. McKENNA:

Q. Do you have an opinion based on your expertise what the MIG pilot is telling the control center to do by saying "mark it"?

MR. KASTRENAKES: Objection. Beyond the scope of his expertise.

THE COURT: Overruled.

BY THE WITNESS:

A. He shot down an airplane. He is telling the ground control to mark it on his radar where it went down.

BY MR. McKENNA:

Q. Why wouldn't the pilot give coordinates?

MR. KASTRENAKES: Objection.

THE COURT: Sustained.

BY MR. McKENNA:

Q. Do you have an opinion why the MIG pilot wouldn't give coordinates?

A. He is traveling nine miles a minute and he doesn't have access to his coordinates at that time.

Q. In your expert opinion, when the pilot says "mark it" as to the first aircraft being shot down, is that reflected on the [9878] onion skin that you saw in Cuba?

A. I saw when the track terminated and that is Colonel Capote who said that is the general area where the shoot down occurred.

Q. Does the same sequence occur for the second shoot down as well?

A. Yes.

Q. With respect to the U.S. radar, I want to shift gears and go back to that for a minute. You stated that the radar that would have been relied upon for activities close to Cuba was the aerostat balloon?

A. U.S. radar, yes.

Q. Have you studied some papers on that aerostat balloon put out by RADES?

A. Yes, I have.

Q. Are you aware of flaws in the aerostat balloon?

A. The paper discussed the accuracy of the system, yes.

Q. What are the flaws with the aerostat balloon?

A. Basically it has a plus or minus one and a half mile accuracy in azimuth and a half mile error in range.

Q. Is the aerostat balloon fixed or is it at the time erred?

A. It is in the air at the time erred.

Q. Does that create any problems with respect to accuracy?

A. Yes. Weather conditions can affect the accuracy.

Q. The RADES program you said you reviewed, was that raw radar

[9915] A. No.

MR. KASTRENAKES: Same objection.

MR. McKENNA: It is part of his expert opinion.

THE COURT: Rephrase your question. Sustained.

BY MR. McKENNA:

Q. Based on your expert opinion how MIG pilots operate and how fighter pilots operate in general, do they know their exact longitude and latitude when they are fixed on a target?

A. No.

Q. Why not?

A. You don't have an exact read out. Things are happening fast. You are looking outside the cockpit and that is not your frame of reference. The frame of reference is the airplane and the target, not a geographical reference.

Q. We are now going over to page 11.

On page 11, after the pilot says we downed him; the pilot then says "mark it, mark it," then again a line later he says "mark the spot," and again later, three more lines down, "mark the spot, mark the spot," then UP says "marked."

Who is UP?

A. The air defense chief.

Q. In your expert opinion, what is going on right here?

A. He is noting the location on the radar scope. The fighter pilot wants the air defense chief to note the location and the air defense chief located it.

[9916] Q. When he says "mark it," mark it on what?

A. On the radar scope and on the plexiglas.

Q. The onion skin you examined with the plots, was that taken from the plexiglas?

A. Yes.

Q. Where did that show the proximate location of the first shoot down?

A. The proximate location -- may I refer to my notes, please?

Q. Yes, you may.

A. Do you want latitude and longitude or distance?

Q. Can you give us the latitude and longitude and distance from the Cuban coast?

THE COURT: Ladies and gentlemen of the jury, these out of court statements are not coming in for the truth of the matter asserted but to assist you in evaluating the expert's opinion and testimony.

BY THE WITNESS:

A. The first shoot down 2456, according to the map that I got that was a copy of the onion skin, the shoot down was at roughly 1521 or 321 local. The coordinates were as I took them off the map were 2306 North, 8239 West. That is approximately six miles off the Cuban coast.

Q. Let me show you what is in evidence as 492E.

MR. KASTRENAKES: It is not in evidence. It is a blank navigational chart, a duplicate of what is in evidence



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[13874] the -- that is what makes it a morally culpable act. That is not a jurisdictional thing, and that is embodied in the instructions that we have proposed and that the Court proposes, adding as a finding of fact for the jury, that at least one of the shootdowns in fact occurred in the special maritime and territorial jurisdiction.

THE COURT: We will be in recess for fifteen minutes.

(Therefore a brief recess was taken, after which the following proceedings were had.)

(Open court. Jury not present.)

THE COURT: We are back on United States of America versus Gerardo Hernandez et al.

Counsel, state their appearances again for the record.

(All parties present.)

THE COURT: The interpreters are also present.

MS. MILLER: I did get a chance to look more at Walker over the break.

THE COURT: I will give a ruling at this time.

The criminal intent required by 18 United States Code Section 1111 for murder in the first degree is both malice aforethought and premeditated intent. Malice aforethought means to kill another person deliberately and intentionally and premeditated intent, killing with premeditated

intent, premeditation is defined as typically associated with killing in cold blood and requires a period of time in which the [13875] accused deliberates or thinks the matter over before acting.

In addition, Title 18 United States Code, Section 1111 defines murder as the unlawful killing of a human being, then goes on to state with malice aforethought, then provides the language for premeditated intent.

Feola at 420 U.S. holds that general knowledge of the status of a federal law enforcement is not required, also states, and I quote from page 686, "we are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under Section 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea.

"For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent."

This is the exact provision that is later quoted in the case of United States versus Conroy, 9 F.2nd, 1998 when the Fifth Circuit found, consistent with Feola that Feola teaches in order to effectuate the congressional purpose of according maximum protection to federal officers by making prosecution

[13876] for assaults upon them cognizable in the federal courts, Title 18 United States Code Section 111 cannot be construed as embodying an unexpressed requirement that the assailant be aware that his victim is a federal officer. The statute requires an intent to assault, not an intent to assault a federal officer.

The Conroy/Walker court then cites the very provision that I have just cited from Feola, and goes on to hold that in the Walker case, that case dealt with a negation of criminal intent, in that circumstance, knowledge was a relevant consideration.

Consistent with Feola, therefore, and of a general rule regarding status regarding 111, and its additional teaching, that knowledge may be a relevant consideration under certain circumstances, and the circumstances that the Feola court cites are justification, unlawful actions in that case by a perception, a reasonable interpretation of unlawful use of force by the victim and mistake of fact.

Here the government has presented their case and indicated from the very start of this case in opening statement, that the final task of the Wasp Network was to bring about murders over international waters; and the presentation of their evidence proceeded from there as that was the plan, the object of the conspiracy.

Therefore, based upon the teachings of Feola and [13877] Walker and finding that the facts and circumstances of this case as presented by the government and the defendants may negate the existence of mens rea, and this should be a

determination that this jury makes as to whether or not this defendant possessed the mens rea required by the statute and the government has proven conspiracy to commit murder in the first degree.

Therefore, I am granting Mr. McKenna's request, and I will give the pattern jury instruction 11.1 as modified to reflect Title 18 United States Code Section 1117 makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which is actually carried out, would amount to a violation of Title 18 United States Code Section 1111. I will give that instruction in its totality and follow it as what is normally done in conspiracy cases with the instruction on the substantive offense.

I find that my ruling follows the teachings of Feola and its progeny.

In regard to the proposed instruction number 19 which is false identification documents, I have had an opportunity to read the Gros case, which I indicated previously the government had cited and I informed Mr. McKenna I would look at it in conjunction with the pattern jury instruction; and I will modify the instruction given in the Gros case, it will substantially track the Gros instruction. Gros is

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[14475] decisions, there are consequences and with consequences come responsibilities. This case is about consequences and responsibilities.

They took the action and decision to join a hostile intelligence bureau. Nobody forced them to do that. They did that on their own. A bureau that sees the United States of America as its prime and main enemy. This was their decision.

These are not the rules of Cuba. This is the United States District Court in the Southern District of Florida. This is an Honorable United States Federal District Judge and you will receive the law of this great country. We are not operating under the rules of Cuba, thank God.

Their loyalty to their country has not been disputed by them in this trial. That loyalty is something that has driven their very action in this case and they chose to dedicate themselves to that. They took those actions and there are now consequences.

Whether you disagree or agree with Jose Basulto - he said one thing I remember when I was asking him questions that kind of rings true and it is in the documents; do you remember when he went back to Cuba in 1961 with the false identities. Yes, he was bent on the overthrow of the communist country of Cuba as he is today, he wants to see Democracy restored and he had those false documents and he told you he knew he was taking a risk, that he knew if he infiltrated that country, at left he

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[14481] dead children to establish who they are.

We had to prove that they weren't who they claimed they were. They plead not guilty, but there is more than just that. You talk about stealing the memories of families. Reverend Medina lost a child 30 years ago. Luis Medina III who died in infancy, and died in a different state than he was born, but that is enough for them, that is what they need. You die in a different state than what you were born in and it is about 30 years ago, well, that is who they become. That is what these guys are about. They don't care.

Ruben Campa was the beloved brother of a homicide detective from Texas. Does that matter to anybody? He died in infancy.

When they see Detective Campa on the streets out in Texas, I think it was in Houston, you probably know because you have the notes; but Ruben Campa, wasn't that a Cuban spy prosecuted in Miami Florida? No. That was my brother. That was not a Cuban spy sent to the United States to destroy the United States. He was born in the United States and if he had been allowed to live, he would love this country.

The hollow words of Mr. Norris he is sorry that his client stole the identity of some child isn't enough. His client wasn't sorry one month before he was arrested when he is out in California hatching another 30, 40 names to be used for the next wave of spies.

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[14643] MS. MILLER: When Mr. Mendez is through, if we could look at it because there have been several iterations.

(Interruption.)

THE COURT: Any objection from the government as to Mr. Mendez' list?

MS. MILLER: No, Your Honor.

THE COURT: I will make all of them uniform without any identifying features. The government's list will be identified as the government's trial exhibits and the defendants will be identified as defendants and no other identifying features and they will all go in stapled.

There are one or two other matters I need to discuss with counsel side bar.

(Side bar.)

THE COURT: The Sun Sentinel called the jury pool yesterday wanting the names of the twelve jurors.

MR. BLUMENFELD: They were on TV last night, the jury.

THE COURT: Were they filmed?

MR. BLUMENFELD: Yes.

THE COURT: That is the second issue I want to discuss with you.

As I understand it from jury pool, of public record is the entire venire, the 250 people who were summoned initially and that is what they would provide. They have not provided anything as of yet because I wanted to first of all bring this



ANOTHER ORDER OF BUSINESS, ACCORDING TO THE OPERATIONAL SITUATION OF THE PLACE, HOW YOU DEVELOP YOUR LEGAL COVER AND IF YOU HAVE COME ACROSS ANY DIFFICULTIES IN THAT SENSE. IN THE SAME WAY, EVERYTHING RELATING TO YOUR ACCENT.

2.-) YOUR INSTRUCTIONS THAT THE COMRADES LISTEN TO RAUL'S SPEECH TRANSMITTED BY ARUCA WERE CORRECT. REMEMBER THE IMPORTANCE OF EXCHANGE WITH THEM IN THIS SENSE, LOOKING AT THE FORMATION OF THEIR POLITICAL IDEOLOGY.

3.-) IT IS VERY IMPORTANT THAT YOU SEND US THE STUDY YOU DID AT EACH OF THE DIFFERENT COMPANIES FOR THE ACQUISITION OF THE BEEPER, THAT IS, THE PAPERWORK THEY REQUIRE AT EACH COMPANY AND ON THE OTHER HAND ALL THE STEPS TAKEN IN THE ACQUISITION OF SAME.

4.-) IT IS NECESSARY THAT YOU INFORM US ABOUT ALL THE STEPS TAKEN TO ENROLL IN ENGLISH CLASS, AS WELL AS THE CONDITIONS AND CHARACTERISTICS OF SAID COURSE.

ON THE OTHER HAND, JUST AS YOU EXPRESSED, YOU SHOULD COMMENT REGARDING THE AID IT HAS GIVEN YOU FOR YOUR LEGEND AND THE ESTABLISHMENT OF NEW RELATIONS.

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5.-) JUST AS WE INFORMED YOU VIA RADIO, YOU WERE RECOGNIZED BY THE HEAD OF THE DI FOR OPERACION VENECIA. THE ORDER SAYS THE FOLLOWING:

ORDER FROM THE CHIEF OF THE DIRECTORATE OF INTELLIGENCE APRIL 1, 1996  
NO: 84 CITY OF HAVANA

TO GRANT RECOGNITION TO PERSONNEL  
KEEPING IN MIND THE OUTSTANDING RESULTS ACHIEVED ON THE JOB:

I ORDER:

FIRST: GRANT RECOGNITION FOR THE OUTSTANDING RESULTS ACHIEVED ON THE JOB, DURING THE PROVOCATIONS CARRIED OUT BY THE GOVERNMENT OF THE UNITED STATES THIS PAST 24TH OF FEBRUARY OF 1996. TO THE COMRADES:

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Reviewed by: LS Salomon  
Declassified by: KMDJr/RJG  
MM-10517  
9/24/00

DG-108 (E) RSB(~ARIO).wpd

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GERALDO

SECOND: GIVE KNOWLEDGE OF THE PRESENT ORDER TO THE ESTEEMED COMRADE AND TO THE CHIEFS AND OFFICIALS THAT PARTICIPATE IN IT'S FULFILLMENT  
THIRD: ANNOTATE IT IN THE COMRADES SERVICE CARD.

CHIEF, DIRECTORATE OF INTELLIGENCE,  
BRIGADIER GENERAL EDUARDO DELGADO RODRIGUEZ.

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[....material omitted....]

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8.- REGARDING COMMUNICATIONS:

A.-) REGARDING THE OSO P.O. BOX, WE WANT TO INFORM YOU THAT IT WAS DECIDED TO GIVE THIS FORM OF COMMUNICATION GREATER USE, SINCE ON OCCASION WE HAVE RECEIVED THE INFORMATION, ESPECIALLY LORIENTS, WITH SOME DEGREE OF TARDINESS AND THEY HAVE LOST PART OF THEIR VALUE, DUE TO THE MAILINGS NOT BEING STABLE AND THESE WERE LATE, THEREFORE WE WANT TO AVOID THIS WITH THE USE OF THE POST OFFICE BOX THAT YOU HAVE, SINCE THAT WAY THE INFORMATION WOULD GET TO US MORE PERIODICALLY.

THIS WAS THE REASON FOR THE INSTRUCTIONS THAT WERE SENT TO YOU SO YOU WOULD SEND MAILINGS TO THE BOX EVERY 15 DAYS, SINCE IN THIS MANNER WE WOULD

RECEIVE MORE UP TO DATE INFORMATION, SINCE YOU CAN SEND A FLOPPY WITH ENCRYPTED INFO, LIKE COPRONTOS. ON THE OTHER HAND, WE CAN ALSO RECEIVE ALL TYPES OF NON-SECRET MATERIALS, THAT OTHER COMRADES CAN USE, AS WOULD BE THE CASE WITH DOCUMENTATION, TO GIVE AN EXAMPLE, AND IT WOULD ALSO ALLOW US TO MAINTAIN THE BOX FED, THAT IS, THAT IT RECEIVE MAIL PERIODICALLY AND NOT CALL ATTENTION. ON THE OTHER HAND, DON'T ALWAYS SEND THE SAME TYPE OF MAILINGS, THAT IS, EXPRESS MAIL ENVELOPES, THEREFORE, THERE IS THE NEED THAT ON OCCASION YOU HAVE OTHER TYPES OF MAILINGS USING OTHER ENVELOPES SUCH AS PRIORITY, POSTCARDS, LETTERS, ETC.

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Reviewed by: LS Salomon  
Declassified by: KMDJr/RJG

MM-10517

9/24/00

DG-127 (E) RSC (RSC-32-'PTRS.WPD').wpd

[ . . . material omitted . . . ]

.#10. ABOUT 46. IT'S A GREAT SATISFACTION AND SOURCE OF PRIDE TO US THAT THE OPERATION TO WHICH WE CONTRIBUTED A GRAIN OF SALT ENDED SUCCESSFULLY. IT IS OUR GREATEST HOPE IN THIS JOB, FOR WHICH WE WILL CONTINUE TO WORK SO THAT IT WILL ALWAYS BE LIKE THAT. STOP. WHEN LORIENT LEFT VIA CP HE HANDED IN A PROPOSAL FOR A NEW METHOD OF INFORMING ABOUT THE MEANS. WHEN HE CAME, WE DIDN'T SEE HIM THAT'S WHY WE HAVEN'T DISCUSSED THE MATTER AND THERE ARE LOOSE ENDS. ON SATURDAY LORIENT USED A CODE MEANING REBASING OF FORCES AND MEANS NOT COMMON THAT MIGHT BE ARMY, SPECIAL OPERATIONS, MARINES, ETC., OR REBASING OF TACTICAL EXPLORATION UNITS SUCH AS THE 224 INTELLIGENCE BON. SO FAR I HAVEN'T BEEN ABLE TO FIND OUT EXACTLY FROM HIM BUT WILL TRY TO DO SO. STOP. I THINK THIS MESSAGE WILL GO VIA ESFERA BECAUSE I GAVE 48 TO HORACIO, BUT I DIDN'T RECEIVE 47 AND I THINK IT MIGHT BE RELATED TO 48. IF THAT'S THE CASE I NEED IT REPEATED, URGENTLY. MAYBE THE TIME IS TOMORROW MORNING. STOP. CASTOR TOLD ME ON THE PHONE

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11/7/00

THAT HE HAS NO INFORMATION ABOUT THE FLOTILLA THAT'S NOT PUBLIC KNOWLEDGE; NEVERTHELESS, WE AGREED TO MEET TOMORROW FIRST THING. I WILL CALL HIM AGAIN TONIGHT AND IF HE DOESN'T HAVE ANYTHING IMPORTANT SEE HIM LATER AND PRIORITIZE LISTENING FIRST THING. RPT. HORACIO ALREADY HAS 48, BUT I DID NOT RECEIVE 47, NEEDS TO BE REPEATED URGENTLY IF IT PERTAINS TO THE FLOTILLA. GIRO. APRIL 29.

[ . . . . material omitted . . . . ]

.#19. OK 56. WE WILL MONITOR FREQUENCIES. STOP. AS YOU KNOW, CASTOR HAS BEEN INSTRUCTED NOT TO CREATE A SCANDAL WITH MATTER OF HIS WIFE. FROM THE VERY BEGINNING HE WAS WORRIED THAT HIS PASSIVITY WOULD ATTRACT ATTENTION. WE TOLD HIM BECAUSE OF THE GERMAN CASE AND BECAUSE OF HIS BEING A PILOT THAT IT WAS ALSO A BAD IDEA TO COME OUT OF HIDING BECAUSE HE WOULD CERTAINLY BE AN OBJECT OF DISTRUST BECAUSE OF CURRENT SPY PHOBIA, SO HE SHOULD REMAIN QUIET. NEVERTHELESS, WE HAVE ASKED HIM TO PERIODICALLY TELL US HOW THIS SITUATION IS PROGRESSING; AND HIS LATEST REPORTS STATE THAT BECAUSE

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OF THE DELAY WITH HIS WIFE'S SITUATION IT  
ALREADY CALLS TOO MUCH

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Reviewed by: LS Salomon

Declassified by KMDJr./RJG

Cred. #10517

11/7/00



## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides in relevant part that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”

2. The Fourteenth Amendment to the United States Constitution provides in relevant part that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

3. Section 1111 of Title 18 of the United States Code provides in relevant part:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

\* \* \* \*

4. Section 1117 of Title 18 of the United States Code provides:

If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

**PROTEST AGAINST TRIAL AS UNFAIR –  
PARTIAL LIST OF PARLIAMENTS AND  
PARLIAMENTARY BODIES, HUMAN RIGHTS  
AND LAWYER ORGANIZATIONS, AND  
INDIVIDUALS**

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**Nobel Laureates**

Adolfo Perez Esquivel (Peace Prize – 1980: Argentina); Archbishop Desmond Tutu (Peace Prize – 1984: South Africa); Rigoberta Menchú Turn (Peace Prize – 1992: Guatemala); José Ramos-Horta (Peace Prize – 1996: East Timor); Wole Soyinka (Literature Prize – 1986: Nigeria); Nadine Gordimer (Literature Prize – 1991: South Africa); José Saramago (Literature Prize – 1998: Portugal); Günter Grass (Literature Prize – 1999: Germany); Harold Pinter (Literature Prize – 2005: England); Zhores Alferov (Physics Prize – 2000: Russia)

Public letter to U.S. Attorney General; letter to  
the Editor of *New York Times*, April 11, 2003

**REGIONAL PARLIAMENTS**

**Latin American Parliament (Parlamento  
Latinoamericano) ([www.parlatino.org](http://www.parlatino.org))**

Established by treaty. Consists of representatives elected by the parliaments of 22 Latin American and Caribbean countries: Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador,

Guatemala, Honduras, Mexico, Netherlands-Antilles, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

Resolution, December 2006

**MERCOSUR Parliament (Parlamento de MERCOSUR)**

([www.parlamentodelmercosur.org](http://www.parlamentodelmercosur.org))

Regional institution established by the Republics of Argentina, Brazil, Paraguay, Uruguay and Venezuela. Responsibilities include the preservation of democratic systems and respect for human rights by the member countries.

Declaration, April 29, 2008

**Latin American and Caribbean Parliamentarians**

Meeting of parliamentarians from fifteen countries in Latin America and the Caribbean as well as parliamentarians from five regional parliaments: Latin American Parliament (Parlamento Latinoamericano), Andean Parliament (Parlamento Andino), Central American Parliament (Parlamento Centroamericano), MERCOSUR Parliament (Parlamento de MERCOSUR) and the Indigenous Parliament.

Declaration, July 7, 2008

**European Parliament**

([www.europarl.europa.eu](http://www.europarl.europa.eu))

*Vice-President of the European Parliament and the Parliament's Bureau and 19 other Members* from the United Kingdom, Germany, France, Italy, Spain, Belgium, Portugal, Greece and Cyprus, including the Vice-Chairman of the Delegation for relations with the United States, the Vice-Chairwoman of the Subcommittee on Human Rights; current and former members of the Committees on Foreign Affairs, Human Rights, Civil Liberties, Justice and Home Affairs; and delegation members for relations with the countries of Central America and Mexico and to the Euro-Latin American Parliamentary Assembly.

Letter to U.S. Ambassador to European Parliament, January 8, 2007; letter to President of Delegation for Central American and Mexican Relations (European Parliament), October 8, 2003; letter to European Council, the European Commission, the President of the European Parliament, the General Affairs and External Relations Council and the presidents of seven different political groups, November 19, 2007

*GUE/NGL Group* – 41 Members of the European Parliament from thirteen European countries.

Declaration, October 25, 2006

*European Parliament session.* Parliamentary questions raised by numerous European Parliament Members, October 5, 2006 and October 22, 2003

Declaration, October 31, 2006

**African, Caribbean and Pacific-European  
Union Parliamentary Assembly - Vice-  
President**

Created by 101 countries in the Cotonou Agreement.  
Consists of 79 elected representatives of the  
European Parliament and elected representatives of  
79 African, Caribbean and Pacific states.

Responsibilities include the protection and promotion  
of human rights, democratic principles and the rule  
of law.

Letter to President of Delegation for Central  
American and Mexican Relations (European  
Parliament), October 8, 2003

***INTERNATIONAL BODIES***

**Ibero-American Federation of Ombudsmen  
(Federación Iberoamericana de Ombudsman)  
([www.portalfio.org](http://www.portalfio.org))**

Federation of officials in Spain and sixteen countries  
in the Americas and the Caribbean who are national,  
provincial and local government officers serving as  
Ombudsmen, Public Defenders, Commissioners, and  
Presidents of Public Human Rights Commissions. In  
addition to Spain, the officials are from: Andorra,  
Argentina, Bolivia, Columbia, Costa Rica, Ecuador,  
El Salvador, Guatemala, Honduras, Mexico,  
Nicaragua, Panama, Paraguay, Peru, Portugal and  
Venezuela. Their official duty, imposed by law, is the  
protection of the human rights of citizens against  
governmental abuse.

Pronouncement, March 27, 2008

**Permanent Conference of the Political Parties  
of Latin America and the Caribbean  
(Conferencia Permanente de Partidas Políticos  
de América Latina y el Caribe)  
([www.copppal.org.mx](http://www.copppal.org.mx))**

Created in 1979, the Permanent Conference consists of 60 political parties from 26 countries in South and Central America as well as the Caribbean, including Brazil, Mexico, Columbia, Argentina and Chile. Its responsibilities include the protection and promotion of human rights, democracy and legal and political institutions.

Declaration, April 19, 2008

**Inter-Parliamentary Union – More than 50  
members of the 113<sup>th</sup> General Assembly  
([www.ipu.org](http://www.ipu.org))**

International body comprised of representatives chosen by the 154 member national parliaments. Established in 1889.

Declaration, October 2005

**Latin American Council of Churches (Consejo  
Latinoamericano de Iglesias)  
([www.clailatino.org](http://www.clailatino.org))**

Comprised of 139 member churches and religious organizations in 19 countries. Its mission has focused on the building of a just and participatory society.



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Declaration, October 20, 2008

**Party of the European Left ([www.european-left.org](http://www.european-left.org))**

Composed of national political parties in 17 different countries.

Resolution, November 25, 2007

**American Association of Jurists**

Non-governmental Organization with consultative status to the United Nations Economic and Social Council and with membership in all countries of the American continent. Its main principles and objectives include the defense and promotion of human rights and the realization of better and more effective guarantees to their protection.

Declaration, October 8, 2007; resolutions,  
January 28, 2005 and November 14, 2003

**International Association of Democratic Lawyers ([www.iadllaw.org](http://www.iadllaw.org))**

Non-governmental organization founded in 1946 with more than 16 member organizations in 4 continents and with consultative status to the United Nations Economic and Social Council and the United Nations Educational, Scientific and Cultural Organization.

Public statement, June 6, 2008

***LATIN AMERICA***

## **MEXICO**

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### **Senate (Senado de la República) ([www.senado.gob.mx](http://www.senado.gob.mx))**

Adopted Points of Agreement (Unanimously Approved), October 7, 2006, and September 28, 2006.

### **Senate - North American Foreign Relations Committee (Senado de la República - Comisión de Relaciones Exteriores, América del Norte)**

Adopted Point of Agreement, October 7, 2006

### **House of Representatives (Cámara de Diputados de la República) ([www.diputados.gob.mx](http://www.diputados.gob.mx))**

Public statement, July 9, 2003 (300 Deputies)

### **State of Aguascaliente - Congress (Congreso del Estado) ([www.congresoags.gob.mx](http://www.congresoags.gob.mx))**

Decree, October 10, 2007

## **BRAZIL**

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### **House of Deputies - Human Rights and Minorities Commission (Camara dos Deputados - Comissão de Direitos Humanos e Minorias)**

Adopted Repudiation Motion, June 26, 2006;  
adopted Motion in the Defense of Human Rights, April 10, 2007

**National Congress (Congresso Nacional de Brasil) – Chairs of 24 Parliamentary Commissions, including the Senate Human Rights and Legislation Participatory Commission and House of Deputies Foreign Relations and National Defense Commission and 118 Deputies and 14 Senators from fourteen different political parties**  
([www.senado.gov.br](http://www.senado.gov.br)) ([www.camara.gov.br](http://www.camara.gov.br))

**Order of Attorneys of Brazil (Ordem dos Advogados do Brasil) ([www.oab.org.br](http://www.oab.org.br))**

The Brazilian bar association, founded in 1930. Responsible by law for regulation of the legal profession.

Letter to Director of the Human Rights and Social Issues, Department of the Ministry of Foreign Relations of Brazil, September 12, 2006

**Municipality of Ribeirao Preto – Municipal Chamber (Camara Municipal do Ribeirao Preto) ([www.camararibeiraopreto.sp.gov.br](http://www.camararibeiraopreto.sp.gov.br))**

Declaration, April 5, 2005

**Municipality of Porto Alegre – Municipal Chamber (Camara Municipal do Porto Alegre) ([www.camarapoa.rs.gov.br](http://www.camarapoa.rs.gov.br))**

Adopted Motion, February 22, 2006

**ARGENTINA**

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**House of Deputies (Cámara de Diputados)**  
**([www.diputados.gov.ar](http://www.diputados.gov.ar))**

Letter to U.S. Attorney General, August 24,  
2005 (20 Deputies)

**Legislature of Buenos Aires (Legislatura de la  
Ciudad Autónoma de Buenos Aires)**  
**([www.legislatura.gov.ar](http://www.legislatura.gov.ar))**

Declaration, October 23, 2008

**Municipal Council of Rosario (Concejo  
Municipal Rosario)**  
**([www.concejorosario.gov.ar](http://www.concejorosario.gov.ar))**

Declaration, November 13, 2008

**Workers Association of the State (Asociación  
Trabajadores del Estado)**  
**([www.ateargentina.org.ar](http://www.ateargentina.org.ar))**

Declarations, April 29, 2008 and September  
12, 2005

**Bar Association of Santiago de Estero,  
Argentina (Colegio de Abogados de Santiago  
del Estero) ([www.abogadossantiago.com.ar](http://www.abogadossantiago.com.ar))**

Resolution, November 4, 2004

**44 leaders of human rights organizations,  
political leaders, lawyers, journalists,  
academics and trade unionists**

**CHILE**

**Senate (Senado de la República) – Human Rights, Nationality and Citizenship Commission ([www.senado.cl](http://www.senado.cl))**

Resolution, May 2008

**Judge Juan Guzmán Tapia**

Member of Chile's Court of Appeals for 22 years, Judge Juan Guzmán Tapia tried former Chilean dictator Augusto Pinochet on human rights charges and has investigated 99 cases of human rights violations in total. Currently, Dean of the law school at the Central University of Chile (Universidad Central de Chile) and director of its Center for the Study of Human Rights.

Press Release, September 27, 2007

**BOLIVIA**

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**National Senate (Senado Nacional)  
([www.senado.bo](http://www.senado.bo))**

Declaration, September 17, 2008

**House of Deputies (Cámara de Diputados)  
([www.congreso.gov.bo](http://www.congreso.gov.bo))**

Declarations, November 5, 2008 and October 11, 2007

**Province of Chaco – House of Deputies  
(Cámara de Diputados de Chaco)**

Resolution, September 10, 2008

## **PERU**

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**Congress (Congreso de la República de Peru)**  
([www.congreso.gob.pe](http://www.congreso.gob.pe))

Approved Motion, September 29, 2008

## **VENEZUELA**

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**National Assembly (Asamblea Nacional)**  
([www.asambleanacional.gob.ve](http://www.asambleanacional.gob.ve))

Resolution, September 23, 2008

## **PANAMA**

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**National Assembly – President and Vice-President of the National Assembly and the President of the Commission of Foreign Relations**

Special Declaration, October 10, 2007

**National Assembly – Foreign Relations Commission (Asamblea Nacional – Comisión de Relaciones Exteriores)** ([www.asamblea.gob.pa](http://www.asamblea.gob.pa))

Resolutions, October 22, 2008 and October 3, 2006

**National Bar Association of Panama (Colegio Nacional de Abogados de Panamá)**  
([www.cnapanama.com](http://www.cnapanama.com))

Panama's official bar association; compulsory membership for lawyers. Its purposes include

protection of the rule of law and improvements to the administration of justice.

Resolution, October 27, 2008; pronouncement, October 8, 2007

**Ecumenical Committee of Panama (Comité Ecuménico de Panamá)**

Includes the Catholic Church, the Greek Orthodox Church, the Russian Orthodox Church, the Anglican Church, the Evangelical Methodist Church of Panama, the Methodist Church of the Caribbean and the Americas, the Baptist Calvary Church, the Union Church, the Lutheran Church and the Salvation Army of Panama.

Declarations, October 20, 2008 and October 8, 2007; pronouncement, September 28, 2006

**Democratic Revolutionary Party (Partido Revolucionario Democrático)**

Largest political party in Panama, with more than 650,000 members. It is currently the governing party.

Public statement

**National Federation of Associations and Organizations of Public Employees (Federación Nacional de Asociaciones y Organizaciones de Empleados)**

Resolution, September 8, 2007



**Association of Trial Attorneys of Panama  
(Asociación de Abogados Litigantes de Panamá)**

Public statement, October 5, 2007

**Istmeña Academy of International Law  
(Academia Istmeña de Derecho Internacional)**

Public statement, September 6, 2006

**Independent Lawyers Association of Panama  
(Frente de Abogados Independientes de Panamá)**

Declaration, October 4, 2007

**PARAGUAY**

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**House of Deputies (Cámara de Diputados del Paraguay) – 27 Deputies  
([www.diputados.gov.py](http://www.diputados.gov.py))**

Declaration, November 2007

**ECUADOR**

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**Chamber of Anglican Bishops of Ecuador  
(Cámara de Obispos Anglicanos del Ecuador)**

Letter to U.S. Attorney General, August 9,  
2006

**Permanent Assembly of Human Rights – APDH  
of Ecuador (Asamblea Permanente de Derechos  
Humanos - APDH del Ecuador) ([www.apdh.ec](http://www.apdh.ec))**

Non-governmental organization founded in 1984 to support human rights.

Declaration

**COLUMBIA**

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**Collective Corporation of Lawyers José Alvear Restrepo (Corporación Colectivo de Abogados José Alvear Restrepo)**  
([www.colectivodeabogados.org](http://www.colectivodeabogados.org))

Organization dedicated to defending human rights, with consultant status to the Organization of American States. Member of the International Federation of Human Rights.

**Columbian-Panamanian Institute of Procedural Law (Instituto Colombo - Panameño de Derecho Procesal)**  
([www.institutocolombopana.com](http://www.institutocolombopana.com))

Resolution, July 20, 2004

**EUROPE**

**UNITED KINGDOM OF ENGLAND AND WALES**

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**House of Commons - 112 Members of House of Commons**  
([www.parliament.uk/commons/index.cfm](http://www.parliament.uk/commons/index.cfm))

The MP's include a former Secretary of State for Foreign Affairs, a current Minister and a former Minister.

Public letter to U.S. Attorney General,  
February 8, 2006; statement in the House of  
Commons, Nov. 21, 2002.

## **Trade Unions**

The Trade Union Congress and twenty-four  
additional national trade unions, representing almost  
all of organized labor. Represents over six million  
members.

Motion passed unanimously, September 10,  
2008; declaration published in *Guardian* and  
*Independent*, October 2008; public letter to  
U.S. Attorney General, February 8, 2006.

**Tens of thousand individuals, including former  
Ministers of State, numerous political leaders,  
academics, writers, and film and theater artists**

Signatories include two former Secretaries of State  
and a former Minister.

Declaration published in *Guardian* and  
*Independent*, October 2008.

## **GERMANY**

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**German Parliament (Bundestag) – Chair of  
Parliamentary Commission on Human Rights  
and Humanitarian Aid and 64 other Members  
([www.bundestag.de](http://www.bundestag.de))**

Letters to the U.S. Congress, September 7,  
2006, July 2006 and June 16, 2006

## **IRELAND**

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### **Irish Parliament (Oireachtas) – 53 Members from all political parties ([www.oireachtas.ie](http://www.oireachtas.ie))**

Letter to U.S. Attorney General, September 30, 2005; public statements, November 20, 2003 (Labor Party Whip on behalf of all Labor Party Deputies and Senators) and December 8, 2004; letter to the Editor of *Irish Independent*, September 24, 2008

## **ITALY**

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### **Senate (Senato della Repubblica) – 39 Senators, including the former Vice-President of the Senate and former Chairperson of the Judiciary Committee ([www.senato.it](http://www.senato.it))**

Letter to the U.S. Senate, October 25, 2006

## **SPAIN**

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### **Nineteen Municipal Councils**

Adopted motion, February - June 2006, September 2005, February 2004 and November 2003

**Over 1,100 individuals, including political leaders, trade unionists, artists and businessmen.**

Letter to U.S. Attorney General, January 2006

## **SWITZERLAND**

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**Federal Assembly – 48 Members from all parties and including Members on the Council of State's Juridical Affairs Commission and the joint Assembly's Judiciary Commission**  
([www.parlament.ch](http://www.parlament.ch))

Letter to U.S. Ambassador to Switzerland,  
October 3, 2007

## **BELGIUM**

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**Flemish Parliament (Vlaams Parlement) – 35 Members** ([www.vlaamsparlement.be](http://www.vlaamsparlement.be))

Declaration, February 2006; letter to U.S. Ambassador in Belgium, November 8, 2007; public letter, October 27, 2006

## **NORWAY**

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**National Federation of Teachers – Vesterålen Region**

Request to the First Minister of Norway, May 2008

## **CANADA**

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**Parliament– 56 Members, including the former Minister of Justice for Quebec, several members of the Foreign Affairs and International Development Committee and the Vice-Chair of the Immigration Committee, and the acting leader of the Bloc Québécois**  
([www.parl.gc.ca](http://www.parl.gc.ca))

486a

Letters to Canadian Minister of Foreign  
Affairs and U.S. Attorney General, June 19,  
2008 and December 12, 2007

**Canadian Federation of Students ([www.cfs-fcee.ca](http://www.cfs-fcee.ca))**

Comprised of more than 500,000 students from over  
80 university and college students unions.

Resolution and letter to President of the  
United States, June 9, 2008

**Ninety-One Academics, Trade Unionists,  
Writers and Film and Theater Artists**

Letter to U.S. Attorney General, U.S.  
Ambassador to Canada and Foreign Affairs  
Minister of Canada, February 21, 2008

**RUSSIA**

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**Parliament (State Duma) ([www.duma.gov.ru](http://www.duma.gov.ru))**

Call to U.S. Congress (Unanimously  
Approved), February 21, 2007

**JAPAN**

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**Former Speaker of the Japanese House of  
Representatives and 53 other current and  
former member of the National Diet, lawyers  
and law professors, 5 legal and human rights  
organizations**

The former Speaker of House of Representatives; the former Vice-President of the Japan Federation of Bar Associations; several current and former members of the House of Councillors and House of Representatives; numerous practicing lawyers and law professors; Japan Civil Liberties Union, the Foundation for Human Rights in Asia, the Japan Democratic Lawyers' Association, the Japan Lawyers International Solidarity Association and the Lawyers Center for Social Democracy.

## **INDIA**

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**30 political leaders including the Minister of Education (State of Kerala), unionists, writers and artists**

Letter to U.N. Secretary General, October 27, 2008

## **TURKEY**

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**Grand National Assembly of Turkey (Türkiye Büyük Millet Meclisi - TBMM) – Friendship with Cuba Parliamentary Group**  
([www.tbmm.gov.tr/english/english.htm](http://www.tbmm.gov.tr/english/english.htm))

Declaration, September 2008

## **NAMIBIA**

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**National Assembly ([www.parliament.gov.na](http://www.parliament.gov.na))**

Resolution (Unanimously Approved), July 9, 2008



**MALI**

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**National Assembly (Assemblée Nationale,  
Republique du Mali) ([www.assemblee-nationale.insti.ml](http://www.assemblee-nationale.insti.ml))**

Declaration, June 2, 2006

**UNITED STATES OF AMERICA**

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**National Association of Criminal Defense  
Lawyers ([www.criminaljustice.org](http://www.criminaljustice.org))**

Amicus Curiae in the United States Court of  
Appeals for the Eleventh Circuit

**National Association of Federal Defenders  
([www.federaldefenders.org](http://www.federaldefenders.org))**

Amicus Curiae in the United States Court of  
Appeals for the Eleventh Circuit

**Florida Association of Criminal Defense  
Lawyers ([www.facdl.org](http://www.facdl.org))**

Amicus Curiae in the United States Court of  
Appeals for the Eleventh Circuit

**National Conference of Black Lawyers  
([www.ncbl.org](http://www.ncbl.org))**

Letter to U.N. High Commissioner for Human  
Rights, September 2007

**National Jury Project ([www.njp.com](http://www.njp.com))**

Amicus Curiae in the United States District  
Court for the Southern District of Florida

**National Lawyers Guild ([www.nlg.org](http://www.nlg.org))**

Amicus Curiae in the United States Court of  
Appeals for the Eleventh Circuit, December  
2005; Letter to U.N. High Commissioner for  
Human Rights, September 2007; resolution,  
November 2007; public statement, June 5,  
2008;

**National Organization of Legal Service  
Workers NOLSW/UAW Local 2320**

Letter to U.N. High Commissioner for Human  
Rights, September 2007

**Latino National Congress  
([www.latinocongreso.org](http://www.latinocongreso.org))**

Annual conference of over 500 organizations from 20  
states to discuss issues that concern Latinos  
nationwide.

Resolution, October 6, 2007

**Council on Hemispheric Affairs ([www.coha.org](http://www.coha.org))**

Report, May 24, 2006

**Center for International Policy  
([www.ciponline.org](http://www.ciponline.org))**

Letter to U.N. High Commissioner for Human  
Rights, September 2007

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**Global Exchange ([www.globalexchange.org](http://www.globalexchange.org))**

Letter to U.N. High Commissioner for Human Rights, September 2007

**Detroit City Council**  
**([www.ci.detroit.mi.us/legislative/](http://www.ci.detroit.mi.us/legislative/))**

Resolution, March 29, 2006

**Ramsey Clark**

Former U.S. Attorney General (1967-69)

Speech, October 1, 2002

***OTHER***

**Over 8,000 individuals and organizations from around the world, including political leaders, trade unionists, academics, writers and film, music and theater artists**

Open Letter to U.S. Attorney General  
([www.liberenlos5.cult.cu](http://www.liberenlos5.cult.cu))

No. 08-987

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**In the Supreme Court of the United States**

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RUBEN CAMPA, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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*Department of Justice*

*Washington, D.C. 20530-0001*

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### QUESTIONS PRESENTED

1. Whether the courts below correctly rejected petitioners' claim that the government's peremptory challenges were based on race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. Whether the district court erred in denying petitioners' motions for change of venue.

3. Whether sufficient evidence supported petitioner Hernandez's conviction for conspiracy to commit murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 1111 and 18 U.S.C. 1117.

4. Whether the court of appeals properly declined to remand petitioner Hernandez's case for resentencing.



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# **In the Supreme Court of the United States**

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No. 08-987

RUBEN CAMPA, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-89a) is reported at 529 F.3d 980. The opinion of the en banc court of appeals (Pet. App. 90a-219a) is reported at 459 F.3d 1121. The initial, now-vacated opinion of a panel of the court of appeals (Pet. App. 220a-318a) is reported at 419 F.3d 1219. The opinion of the district court denying a pre-trial motion for change of venue (Pet. App. 319a-338a) is reported at 106 F. Supp. 2d 1317.

## **JURISDICTION**

The judgment of the court of appeals was entered on June 4, 2008. Petitions for rehearing were denied on September 2, 2008 (Pet. App. 401a-403a, 404a-406a). On November 18, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to

and including December 19, 2008. On December 19, 2008, Justice Thomas further extended the time to and including January 30, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of acting and conspiring to act as agents of a foreign government without notifying the Attorney General, in violation of 18 U.S.C. 951 and 18 U.S.C. 371, as well as other offenses related to covert service on behalf of a foreign government. The court of appeals affirmed all petitioners' convictions and the sentences of petitioners Hernandez and Gonzalez, but remanded for resentencing of petitioners Campa, Medina, and Guerrero. Pet. App. 1a-89a.

1. Petitioners were operatives of the Directorate of Intelligence (DI) of Cuba and members of a DI organization in South Florida known as La Red Avispa, or the Wasp Network. Pet. App. 3a. Petitioners Hernandez, Campa, and Medina were intelligence officers in the Network, and they supervised a number of agents, including petitioners Gonzalez and Guerrero. *Id.* at 3a-4a. As members of the Network, petitioners penetrated U.S. military facilities and transmitted information about the facilities' operations and layout to Cuba. *Id.* at 4a-6a, 36a-37a, 42a-43a, 265a-266a, 285a.

The Network's activities also included penetrating Cuban-American organizations opposed to the Cuban regime. Pet. App. 5a, 119a-120a. Among other organizations, the Network targeted Brothers to the Rescue (BTTR), a Miami-based organization that flew small

civilian aircraft over the Florida Straits to assist rafters escaping from Cuba. *Id.* at 4a, 285a-286a.

In January 1996, BTTR planes twice dropped leaflets that drifted over Havana. Pet. App. 4a. DI headquarters in Cuba responded by initiating Operation Scorpion, which aimed to "perfect" a "confrontation" with BTTR. *Id.* at 4a, 48a. The DI directed petitioner Hernandez to task petitioner Gonzalez and another agent, both of whom had infiltrated BTTR, with procuring detailed information about future BTTR flights. The DI also directed Hernandez to keep the DI agents off of BTTR flights on prescribed dates. *Id.* at 4a, 48a-49a.

On February 24, 1996, three BTTR planes made a scheduled flight over the Florida Straits to search for rafters. Pet. App. 276a. The flight plans were transmitted to Cuba. *Ibid.* When the planes passed the boundary between Miami and Havana air traffic control, which lies in international airspace, they identified themselves to Havana. *Ibid.* Within minutes, Cuban fighter jets pursued two of the BTTR planes. *Id.* at 276a-277a. The Cuban fighters shot down both planes, killing all four men aboard, three of whom were U.S. citizens. Both planes were in international airspace, heading away from Cuba, when they were shot down. Neither plane had entered Cuban airspace. *Id.* at 5a, 276a-277a.

Following the shootdown, petitioner Hernandez wrote to his superiors that he and others took pride in having contributed to an operation that "ended successfully," and the chief of the DI recognized petitioner Hernandez for the "outstanding results achieved on the job, during the provocations carried out by the United States this past 24th of February." Pet. App. 49a.

None of the petitioners notified the United States Attorney General that they were acting as agents of the

Cuban government. Pet. App. 120a. Petitioners employed elaborate measures to conceal their clandestine operations, including code names and countersurveillance. *Id.* at 5a, 38a, 267a. Some petitioners used multiple false identities, backed up by fraudulent documents, including fake United States passports. *Ibid.*

2. Petitioners were indicted by a federal grand jury in the Southern District of Florida in 1998. Pet. App. 92a-94a. A second superseding indictment was filed in 1999. *Id.* at 92, n.2.<sup>1</sup> Petitioner Campa was charged with two counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; one count of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); and one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3).

Petitioner Gonzalez was charged with one count of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371.

Petitioner Guerrero was charged with one count of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; and one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 754(c).

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<sup>1</sup> Although Congress amended certain statutory provisions cited in the indictment after the dates on which petitioners committed their offenses, those amendments are not relevant here.



Petitioner Hernandez was charged with one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 794(c); seven counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; two counts of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3); and one count of conspiracy to murder, in violation of 18 U.S.C. 1117.

Petitioner Medina was charged with four counts of acting as an agent of a foreign government without notifying the Attorney General and one count of conspiracy to commit that offense and to defraud the United States, in violation of 18 U.S.C. 951 and 18 U.S.C. 371; one count of conspiracy to gather and transmit national defense information, in violation of 18 U.S.C. 794(c); two counts of fraud and misuse of documents, in violation of 18 U.S.C. 1546(a); one count of making a false statement in a passport application, in violation of 18 U.S.C. 1542; and one count of possession with intent to use five or more fraudulent identification documents, in violation of 18 U.S.C. 1028(a)(3).

3. Before trial, petitioners moved for a change of venue, contending that pretrial publicity and pervasive community prejudice against anyone associated with the Cuban government would prevent a fair trial in Miami. The district court denied the motion, and an oral request to move the trial within the district, without prejudice. Pet. App. 319a-338a.

The district court held that petitioners had not presented evidence of pretrial publicity or pervasive com-

munity prejudice sufficient to warrant a presumption that the jury would not be fair and impartial. Pet. App. 329a-337a. The court noted that much of the pretrial publicity cited in petitioners' motion did not relate to petitioners' alleged activities, that the most recent articles on the downing of the BTTR planes had been published more than a year beforehand, and that the coverage was "largely factual in nature." *Id.* at 330a-331a. The court also found that a survey conducted by petitioners' expert purporting to demonstrate pervasive community prejudice was faulty in several respects. *Id.* at 331a-336a.

The district court concluded that "thorough voir dire \* \* \* and careful instructions to the jury throughout trial will enable the Court to safeguard [petitioners'] right to a fair and impartial jury in Miami-Dade County," but invited petitioners to renew their motions for change of venue if the voir dire process showed that an impartial jury could not be empaneled. Pet. App. 337a. The court repeated that invitation in denying a motion for reconsideration. *Id.* at 341a.

The district court conducted a two-stage voir dire that lasted seven days. Pet. App. 106a-119a. During the first stage, the court questioned panels of prospective jurors about their qualifications to serve in the case, then permitted the parties to exercise challenges for cause or hardship. *Id.* at 108a-109a. Of 168 prospective jurors questioned, ten were struck for cause at the first stage because of concerns about their opinions about Cuba or acquaintance with persons involved in the case. *Id.* at 113a-114a. During the second stage, the court questioned prospective jurors individually, separated from the rest of the venire, about their exposure to the media, their knowledge and opinions, and their connections to and attitudes about Cuba. *Id.* at 109a-113a. The

parties were then permitted to exercise peremptory challenges, as well as any additional challenges for cause. *Id.* at 114a-115a. By the end of the second stage, 22 additional prospective jurors were struck for cause because of their opinions about Cuba. *Ibid.*

The defense exercised 15 of its 18 peremptory challenges and both of their allotted challenges for alternate jurors. Pet. App. 115a. The government exercised 9 of its 11 peremptory challenges and both of its allotted challenges for alternate jurors. *Id.* at 7a, 426a-433a. Petitioners objected to seven of the government's challenges, claiming that the government struck the prospective jurors because they were African-American, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 7a, 417a-418a, 422a.<sup>2</sup> Accepting the government's race-neutral reasons for its challenges, the district court concluded that the challenges were lawful. *Id.* at 7a, 417a-433a. The seated panel included three African-American jurors and one African-American alternate. *Id.* at 434a.

Despite the district court's earlier invitations, petitioners did not renew their change of venue motions at the conclusion of voir dire. Pet. App. 118a. Counsel instead expressed satisfaction with the conduct of voir dire and, later, with the jury ultimately empaneled. *Id.* at 118a-119a.<sup>3</sup>

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<sup>2</sup> The government also argued that petitioners inaccurately characterized one of the challenged jurors as African-American. Pet. App. 423a. Petitioners did not respond to that argument, and the district court did not resolve the question. *Ibid.*

<sup>3</sup> During the trial, petitioners renewed their requests for change of venue by moving for a mistrial "based on community events and trial publicity." Pet. App. 121a. The district court denied those motions, after determining through a defense requested inquiry of the jury that

After a seven-month trial, the jury found petitioners guilty on all counts. Pet. App. 7a, 155a, 344a.

4. A panel of the court of appeals reversed petitioners' convictions and remanded the case for a new trial. Pet. App. 220a-318a. The panel held that the district court abused its discretion by denying petitioners' motions for change of venue, concluding that empaneling an impartial jury in Miami was "an unreasonable probability" because "[t]he entire community is sensitive to and permeated by concerns for the Cuban exile population in Miami." *Id.* at 311a-312a.

5. The court of appeals granted rehearing en banc. By a 10-2 vote, the en banc court affirmed the district court's denial of the motions for change of venue. Pet. App. 90a-219a.

The en banc court of appeals concluded that the district court did not abuse its discretion in concluding that pretrial publicity did not warrant a presumption of jury prejudice. Pet. App. 133a-137a. The court explained that most of the news materials petitioners had submitted did not relate directly to their crimes, but instead to "subjects such as the community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and other ongoing legal cases, such as the Elian Gonzalez matter." *Id.* at 136a. The court concluded that the "very few" articles that "related directly to the defendants" were "too factual and too old to be inflammatory or prejudicial," and it noted that "most of the venire revealed that they were either entirely unaware of this case, or had only a vague recollection of it." *Id.* at 136a-137a.

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nothing indicated that jurors were not complying with the court's direction to avoid contact with the media reporting on the matter. *Id.* at 122a-123a.

The en banc court also upheld the district court's finding that petitioners' survey evidence was insufficient to establish pervasive community prejudice against persons alleged to have assisted the Castro regime. Pet. App. 138a; see also *id.* at 139a n.219 (upholding the district court's "specific finding" that "the defendants' evidence did not demonstrate that community prejudice warranted a change of venue"). The en banc court agreed with the district court that petitioners' community-attitudes survey was "riddled with non-neutral questions" and was "too ambiguous to be reliable." *Id.* at 138a.

Finally, the en banc court concluded that the district court's voir dire process provided added assurance that the asserted community prejudice would not prevent a fair trial. Pet. App. 140a-145a; see *id.* at 133a. The en banc court noted that the "meticulous," seven-day, two-phase process "was a model voir dire for a high profile case"; that the second-phase questioning revealed that most of the potential jurors and all the actual jurors had been exposed to little or no media coverage of the case; and that only 32 of 168 prospective jurors had been struck for Cuba-related reasons. *Id.* at 141a-142a. The court found further support for its conclusion in petitioners' conduct. The court noted that petitioners did not use all of their peremptory challenges; that petitioners declined to renew their motions for change of venue at the end of voir dire, despite the district court's earlier invitations to do so; and that counsel expressed satisfaction with the conduct of voir dire and, later, with the jury ultimately empaneled. *Id.* at 143a. The voir dire, the court concluded, "rebutted any presumption of jury prejudice." *Ibid.*

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Judge Birch dissented in an opinion joined by Judge Kravitch. Pet. App. 160a-219a. He explained that, “[d]espite the district court’s numerous efforts to ensure an impartial jury in this case,” he was “not convinced that empaneling such a jury in this community was possible because of pervasive community prejudice.” *Id.* at 212a.

6. On remand, a panel of the court of appeals affirmed petitioners’ convictions and the sentences of petitioners Hernandez and Gonzalez, but remanded for resentencing of petitioners Campa, Medina, and Guerrero. Pet. App. 1a-89a.

The court of appeals rejected petitioners’ contention that the government exercised its peremptory challenges in violation of *Batson*. Pet. App. 25a-27a. While noting that the district court had found the government’s proffered reasons for each challenged strike to be race-neutral, the court affirmed on the alternative ground that petitioners failed to establish a *prima facie* case of discrimination. *Id.* at 26a. The court concluded that any inference of discrimination that might arise from the government’s use of some of its challenges to strike African-American prospective jurors was undercut by the facts that the government did not use two of its peremptory challenges and that the jury included three African-American jurors and one African-American alternate. *Id.* at 26a-27a.

The court of appeals also rejected petitioner Hernandez’s claim that there was insufficient evidence to support his conviction for conspiracy to murder under 18 U.S.C. 1111 and 18 U.S.C. 1117. Pet. App. 43a-55a. The court held that, even if, as Hernandez argued, the conspiracy would not have been unlawful had the conspirators intended for the shootdown to occur in Cuban air-



space, rather than international airspace, there was "ample evidence" that Hernandez and his co-conspirators intended for the killing to occur in international airspace, where it did in fact occur. *Id.* at 54a-55a.

Finally, although the court of appeals rejected most of petitioners' challenges to their sentences, the court held that the district court had incorrectly sentenced petitioners Medina, Guerrero, and Hernandez with respect to their convictions for conspiring to gather and transmit national defense information. Pet. App. 62a-63a, 70a. The court held that, under Sentencing Guidelines § 2M3.1(a), the district court should have set those petitioners' offense level at 37 rather than 42 because the district court did not find that petitioners had actually succeeded in gathering or transmitting top secret information. Pet. App. 62a-63a, 70a. The court did not, however, remand for resentencing of petitioner Hernandez because he was subject to a concurrent life sentence on his conviction for conspiracy to murder, making the error harmless. *Id.* at 63a, 70a-71a.

Judge Kravitch concurred in part and dissented in part. Pet. App. 72a-89a. Although she joined most of the court's opinion, she concluded that the evidence was insufficient to prove that the conspirators had planned an unlawful murder in international airspace, rather than a confrontation within Cuban jurisdiction. *Id.* at 87a-88a.

### ARGUMENT

1. Petitioners contend (Pet. 10-14) that the court of appeals erred in concluding that they failed to make a *prima facie* showing under *Batson v. Kentucky*, 476 U.S. 79 (1986), that the government's peremptory strikes



were racially discriminatory. Petitioners' contention does not warrant this Court's review.

a. *Batson* established a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising a peremptory challenge. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory strike on a prohibited basis. *Id.* at 96-97. To make such a showing, the defendant must establish that the "relevant circumstances raise an inference" of racial discrimination. *Id.* at 96. Second, if that showing has been made, the government must come forward with a race-neutral explanation for the strike. *Id.* at 97-98. Third, if the government provides a race-neutral explanation, "the trial court must \* \* \* decide \* \* \* whether the opponent of the strike has proved purposeful racial discrimination." *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam); *Batson*, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. A trial court's ruling on the issue of discriminatory intent is reviewed for clear error. *Snyder v. Louisiana*, 128 S. Ct. 1203, 1207-1208 (2008).

b. The district court rejected petitioners' *Batson* claim on the ground that the government had proffered race-neutral reasons for each challenged strike. See Pet. App. 417a-432a. Without considering the merits of that conclusion, the court of appeals affirmed on the alternative ground that the defendants did not establish a prime facie case of discrimination. *Id.* at 26a. Petitioners contend (Pet. 10-14) that review is warranted because, in their view, the court of appeals erroneously established a "*per se* rule" that "no *Batson* inquiry is

required whenever even one minority juror is seated by a party that does not use all of its strikes." Pet. 11. Petitioners are incorrect.

Contrary to petitioners' contention, the court of appeals' opinion in this case does not establish that "allowing at least one minority juror to serve" will necessarily defeat a *Batson* claim, or that other relevant circumstances, such as a pattern of strikes against persons of a particular race or gender or counsel's statements and questions during voir dire, are irrelevant to the inquiry. See Pet. 11-12; *Batson*, 476 U.S. at 96-97. Rather, in holding that petitioners did not show a prima facie case, the court relied on its earlier decision in *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986) (per curiam), cert. denied, 481 U.S. 1037 (1987), which emphasized similar considerations in determining that "all of the relevant facts and circumstances" did not give rise to an inference of discrimination. *Id.* at 1211; see Pet. App. 26a-27a.

In applying *Dennis*, the court of appeals has explicitly "recognize[d] that the seating of some blacks on the jury does not necessarily bar a finding of racial discrimination." *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990), cert. denied, 500 U.S. 904 (1991). But the court has held that, where, as here, a defendant's claim of racial discrimination rests solely on the number of peremptory challenges the government has exercised against members of a particular race, the government's decision not to exercise available peremptory challenges against members of the same race is a "significant fact" that "undercuts any inference of impermissible discrimination." *Ibid.* That approach is consistent with the approaches of other courts. See, e.g., *United States v. Willie*, 941 F.2d 1384, 1399 (10th Cir. 1991) (the "fact

that the prosecution exercised only four of its six peremptory challenges undercut[] an inference of discrimination since the government, if it had chosen, could have excluded [another minority] from the jury”), cert. denied, 502 U.S. 1106 (1992); *United States v. Young-Bey*, 893 F.2d 178, 180 (8th Cir. 1990) (court of appeals “consider[ed] the presence of two blacks on the petit jury to undermine” defendant’s attempt to make a prima facie showing).

Despite petitioners’ arguments to the contrary (Pet. 12-13), the court of appeals’ approach creates no conflict with those courts that have held that a prosecutor’s decision not to remove all members of a certain race or gender is not necessarily dispositive and that have considered other relevant circumstances in evaluating whether the defendant has established a prima facie case of discrimination. See *Hardcastle v. Horn*, 368 F.3d 246, 251, 256 (3d Cir. 2004), cert. denied, 543 U.S. 1081 (2005); *Coulter v. Gilmore*, 155 F.3d 912, 914, 918-921 (7th Cir. 1998); *Jones v. Ryan*, 987 F.2d 960, 962-963, 972-975 (3d Cir. 1993); *United States v. Alvarado*, 923 F.2d 253, 255-256 (2d Cir. 1991); see also *State v. Duncan*, 802 So. 2d 533, 550, 552 (La. 2001) (concluding that the prosecutor’s decision not to use all available peremptory challenges against members of a particular race, though not dispositive, is a “valid factor” to consider in determining whether the defendant made out a prima facie case of discrimination), cert. denied, 536 U.S. 907 (2002).

Petitioners also err in contending (Pet. 13-14) that “other courts would find that petitioners made out a *prima facie* claim under *Batson*,” based solely on a comparison between the percentage of the government’s available peremptory challenges used to strike African-American venirepersons and the percentage of African-

Americans in the population of Miami-Dade County. For that proposition, petitioners rely primarily on *Alvarado*, in which the Second Circuit employed a similar analysis, using the demographics of the community as a “surrogate” for the demographics of the venire. 923 F.2d at 255-256. The Second Circuit has since made clear, however, that such analysis, though permissible, is “a thin basis for assigning discriminatory motive to an officer of the court.” *Sorto v. Herbert*, 497 F.3d 163, 172 (2d Cir. 2007).

c. In any event, even if there were a conflict on this issue that otherwise merited this Court’s review, this case would not be a suitable vehicle. As explained below, the district court correctly held that no *Batson* violation occurred because the government’s strikes were non-discriminatory. Petitioners could not prevail on their *Batson* challenge absent a demonstration that the district court committed clear error, which they cannot do. And the prevailing view is that, once the district court has credited the government’s explanation, the question of whether that finding was clearly erroneous is the only question for appellate resolution. A grant of certiorari to address any purported conflict on the standards for establishing a prima facie case thus would not alter the result in this case.

i. The district court did not clearly err in finding that race-neutral reasons sufficiently supported the government’s exercise of the challenged peremptory strikes. Pet. App. 420a, 421a, 424a, 428a, 432a. The record reflects that the prosecutor struck one prospective juror on account of her attitudes about U.S. policy on Cuban immigrants, her history of travel to Cuba, and her unusual demeanor. *Id.* at 419a. The district court found those reasons to be sufficient, specifically citing

the juror's unusual demeanor. *Id.* at 420a; see *Snyder*, 128 S. Ct. at 1208, 1209 (“[D]eterminations of credibility and demeanor lie peculiarly within a trial judge’s province, and \* \* \* in the absence of exceptional circumstances, we would defer to the trial court.”) (brackets, internal quotation marks, and citations omitted). Another prospective juror was struck because he was a prison guard, and the prosecution would be relying on witnesses who were prisoners. Pet. App. 420a-421a.<sup>4</sup>

Other prospective jurors were struck for equally valid reasons: one prospective juror was struck after she said that her son’s trial for armed robbery had been unfair, and she had no faith in the jury system, Pet. App. 422a-423a; another was struck because of her demeanor, because she gave “basically one word answers to every question,” and because she was from the same country (Panama) as the family of one of the petitioners, *id.* at 427a; and a prospective alternate was struck because of her apparent difficulty understanding English and inability to read documents in English, as well as her laughter and annoyed demeanor in response to the court’s question about her opinion on Elian Gonzalez, *id.* at 431a-432a.

The district court’s decision to credit the government’s race-neutral explanations for its strikes is not clearly erroneous. The clear-error standard is a high hurdle because “credibility and demeanor” determinations, which pertain to prosecutors and jurors alike, “lie

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<sup>4</sup> The district court accepted the government’s explanation despite the defense’s argument that the explanation was pretextual because the government “didn’t have a problem” with a white prospective juror who worked at the Federal Detention Center. Pet. App. 421a; Gov’t C.A. Supp. Br. 43. As the government explained, the other prospective juror was a clerk who did not guard prisoners. Pet. App. 421a.

peculiarly within a trial judge's province." *Snyder*, 128 S. Ct. at 1208 (internal quotation marks and citation omitted). The district court's rejection of petitioners' *Batson* claim thus is entitled to respect on appeal. See Pet. App. 420a, 421a, 424a, 428a, 432a.

ii. The district court's factual finding that no intentional discrimination occurred fully supports the judgment in this case, regardless of whether a *prima facie* case was made out. Indeed, the prevailing view is that, once a party has provided an explanation for a challenged peremptory strike and the district court has credited it, an appellate court should review that finding for clear error, rather than reviewing the antecedent question whether a *prima facie* case existed.

In *Hernandez v. New York*, 500 U.S. 352 (1991), a plurality of this Court explained that, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." *Id.* at 359. As the plurality noted, that rule is consistent with the rule this Court has applied in employment discrimination cases. *Ibid.* (citing *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)). In *Aikens*, the Court explained that, once a defendant in an employment discrimination case "has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." 460 U.S. at 715. A court thus should proceed "directly" to the ultimate question of intentional discrimination; to ask at that stage whether the plaintiff has made out a *prima facie* case "unnecessarily evade[s] the ultimate question of discrimination *vel non*." *Id.* at 714-715.



In contrast to the court of appeals in this case, most courts of appeals have concluded that, when a trial court has already ruled on the ultimate question of discrimination in a *Batson* case, the only question on appeal is whether the trial court's ruling on that ultimate question is clearly erroneous.<sup>5</sup> That principle provides an added reason for this Court to decline review of the prima-facie-case issue petitioners present. If this Court should agree that the only issue to be resolved on appeal is whether the district court's finding of no intentional discrimination was clearly erroneous, the Court would have no occasion to reach the prima-facie-case issue. Accordingly, no further review of that issue is warranted.

2. Petitioners next contend (Pet. 14-29) that the court of appeals erred in upholding the district court's denial of their motions for a change of venue. They contend that the jury pool in Miami should have been presumed to be prejudiced against them, regardless of the results of the district court's extensive voir dire process, and that they were therefore deprived of their right to

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<sup>5</sup> See, e.g., *United States v. Perez*, 35 F.3d 632, 635-636 (1st Cir. 1994); *United States v. Brown*, 352 F.3d 654, 660-661 (2d Cir. 2003); *United States v. Uwaezhoke*, 995 F.2d 388, 392-395 (3d Cir. 1993), cert. denied, 510 U.S. 109 (1994); *United States v. Lane*, 866 F.2d 103, 105-107 (4th Cir. 1989); *United States v. Williams*, 264 F.3d 561, 571-572 (5th Cir. 2001); *Lancaster v. Adams*, 324 F.3d 423, 432-435 (6th Cir.), cert. denied, 540 U.S. 1004 (2003); *United States v. McMath*, 559 F.3d 657, 664-665 (7th Cir. 2009); *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir.), cert. denied, 528 U.S. 900 (1999); *United States v. Johnson*, 941 F.2d 1102, 1108-1109 (10th Cir. 1991). But see Pet. App. 26a; *United States v. Stewart*, 65 F.3d 918, 924-926 (11th Cir. 1995) (holding that an appellate court may not uphold a trial court's decision to disallow strikes without reviewing the trial court's prima facie case determination), cert. denied, 516 U.S. 1134 (1996).



a trial by a fair and impartial jury. Petitioners' contentions are without merit.

a. The court of appeals correctly upheld the district court's conclusion that petitioners had failed to show that "pervasive community prejudice against the Cuban government and its agents and the pretrial publicity that existed in Miami" warranted a presumption that any jury empaneled would not be fair and impartial. Pet. App. 132a. As the court explained, "Miami-Dade County is a widely diverse, multi-racial community of more than two million people. Nothing in the trial record suggests that twelve fair and impartial jurors could not be assembled by the trial judge to try the defendants impartially and fairly." *Id.* at 158a-159a.

As the court of appeals explained, a defendant can "establish that prejudice against him prevented him from receiving a fair trial and necessitated a change of venue" either by showing that the jury was actually prejudiced against him, or by showing that "widespread, pervasive prejudice against him" in the community warranted a presumption that any jury empaneled would not be fair and impartial. Pet. App. 131a-132a (citing *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), and *Rideau v. Louisiana*, 373 U.S. 723, 726-727 (1963)).

The court of appeals correctly concluded that the media materials submitted by petitioners "fell far short of the volume, saturation, and invidiousness of news coverage" necessary to establish a presumption of jury prejudice. Pet. App. 136a-137a; see, e.g., *Murphy v. Florida*, 421 U.S. 794, 802 (1975). The court of appeals also correctly upheld the district court's finding that "defendants' evidence did not demonstrate that community prejudice warranted a change of venue." Pet. App. 139a n.219.

Finally, as the court of appeals noted, the district court's "careful and thorough voir dire rebutted any presumption of jury prejudice." Pet. App. 143a; see *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991); see also *Murphy*, 421 U.S. at 800. Notably, even though the district court invited petitioners to renew their motions for change of venue if the seven-day voir dire process showed that an impartial jury could not be empaneled, petitioners did not object to empaneling the jury. They instead expressed satisfaction with both the voir dire process and, later, with the jury ultimately empaneled. Pet. App. 143a.

b. Petitioners contend that the court of appeals erred by holding that claims of "uniquely pervasive and severe" community prejudice are "irrelevant as a matter of law." Pet. 15. The court of appeals, however, considered petitioners' claims of community prejudice, and it held that the district court, which "is necessarily the first and best judge of community sentiment," acted reasonably in rejecting those claims, while offering petitioners the opportunity to renew their motions following voir dire. Pet. App. 139a (internal quotation marks and citation omitted); see *id.* at 139a n.219 (noting that the district court made a "specific finding as to prejudice in the community: that the defendants' evidence did not demonstrate that community prejudice warranted a change of venue").

In addressing petitioners' pretrial publicity claims, the court of appeals also correctly discounted news articles about events not directly connected with the matter on trial, such as "community tensions and protests related to general anti-Castro sentiment, the conditions in Cuba, and \* \* \* the Elian Gonzales matter." Pet. App. 136a. This Court has made clear that "unfairness of con-

stitutional magnitude" will not be presumed "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'" *Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (quoting *Murphy*, 421 U.S. at 798). The court of appeals' conclusion that pretrial publicity "regarding peripheral matters" does not give rise to a presumption of prejudice against a defendant, Pet. App. 134a, is consistent with this Court's cases, none of which found that "prejudice can be presumed from pretrial publicity about issues other than the guilt or innocence of the defendant," *ibid.*; *id.* at 146a-149a; see, e.g., *Rideau*, 373 U.S. at 726 (defendant's confession was broadcast on local television); *Sheppard v. Maxwell*, 384 U.S. 333, 355-357 (1966) (media reported numerous prejudicial rumors and accusations regarding defendant charged with murdering his wife).

Petitioners (Pet. 17-18) rely on the language of a handful of appellate decisions to support their claim that other courts have rejected a limitation of the venue inquiry to evidence "directly relate[d] to the defendant's guilt," Pet. 17 (internal quotation marks and citation omitted), but those decisions do not support their argument. See *Whitehead v. Cowan*, 263 F.3d 708, 719-723 (7th Cir. 2001) (rejecting claims of jury prejudice based on newspaper articles directly related to defendant and his criminal record, as well as a newspaper's publication of the names and addresses of the jurors in the case), cert. denied, 534 U.S. 1116 (2002); *United States v. De Peri*, 778 F.2d 963, 971-973 (3d Cir. 1985) (rejecting a claim of jury prejudice based on pretrial publicity because, among other things, the "articles only indirectly concerned [the defendants]," and instead "detail[ed] a structurally similar but apparently separate extortion scheme"), cert. denied, 475 U.S. 1110, and 476 U.S. 1159

(1986); *United States v. Bangert*, 645 F.2d 1297, 1306 (8th Cir.) (concluding that the district court did not abuse its discretion in refusing to grant a mistrial or initiate a continuance based on "prejudicial publicity of world events," citing the district court's determinations "that sufficient precautions had been taken to ensure a fair trial to defendants" and that "the publicity in question did not constitute prejudicial publicity in this case"), cert. denied, 454 U.S. 860 (1981).

Petitioners also err in asserting (Pet. 18) that the decision below conflicts with *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), cert. denied, 550 U.S. 968 (2007). In *Daniels*, the court held that "'the venue [wa]s saturated with prejudicial and inflammatory media publicity about the crime' sufficient for a presumption of prejudice," citing, among other things, news reports identifying the defendant as having killed two police officers and letters to the editor calling for his execution. *Id.* at 1211 (citation omitted); *id.* at 1187, 1211-1212. The *Daniels* court did not rely on press coverage analogous to the articles about Elian Gonzalez and other Cuba-related issues that the court of appeals in this case appropriately discounted. See Pet. App. 136a.<sup>6</sup> Nor did the court of appeals in this case hold, as petitioners suggest, that "pre-trial publicity about the shutdown and

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<sup>6</sup> Despite petitioners' suggestion to the contrary (Pet. 28-29), the government's motion to change venue in *Ramirez v. Ashcroft*, No. 01-cv-4835 (S.D. Fla. June 25, 2002), did not take a contrary position on the significance of the coverage of the Elian Gonzalez matter. In that case, the plaintiff, an INS agent, alleged that the INS discriminated against him as a result of the Elian Gonzalez controversy, and he stirred up "extensive publicity in the local media focusing directly on the facts he alleged in the lawsuit," including causing a videotaped deposition to be broadcast on television. Pet. App. 130a, 152a-153a (citation omitted).

the jurors' regular exposure to a monument to BTTR were categorically irrelevant." Pet. 18. The court of appeals, like the district court, considered publicity about the shutdown, but concluded that it was "too factual and too old to be inflammatory or prejudicial." Pet. App. 136a; see *id.* at 330a-331a.

c. Petitioners next contend (Pet. 18-21) that the court of appeals erred by employing a too-onerous standard in determining whether they had carried their burden and that the circuits are in conflict on that issue. Their claim does not warrant further review.

The court of appeals in this case stated that a district court must grant a motion for change of venue based on presumed prejudice if the defendant shows that there is a "reasonable certainty" that "widespread, pervasive prejudice against him" in the community "will prevent him from obtaining a fair trial by an impartial jury." Pet. App. 132a; accord *id.* at 149a. Petitioners are correct (Pet. 19-20) that different courts have employed different formulations. Compare, *e.g.*, *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir.) ("Prejudice may properly be presumed when," *inter alia*, "inflammatory publicity about a case has so saturated a community that it is almost impossible to draw an impartial jury from that community."), cert. denied, 502 U.S. 809 (1991), with *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999) (defendant failed to show a "reasonable likelihood that pretrial publicity would prevent a fair trial") (internal quotation marks and citation omitted), cert. denied, 529 U.S. 1108 (2000). There is no

reason to believe, however, that those different formulations have resulted in different outcomes.<sup>7</sup>

In any event, this case would not be a suitable vehicle for resolving any differences among the various formulations of the applicable standard. Regardless of the standard it applied to petitioners' initial efforts to establish presumed jury prejudice, the court of appeals correctly held that any presumption of prejudice was rebutted by the district court's careful voir dire and trial manage-

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<sup>7</sup> Notably, petitioners cite few cases in which courts have in fact found a "reasonable likelihood" that the defendant would not receive a fair trial. In each of those cases, communities were saturated with media stories about the particular crime. See *State v. James*, 767 P.2d 549, 551, 553-556 (Utah 1989) (change of venue was warranted in a case involving the disappearance and death of a three-month-old infant in "a relatively small and homogeneous geographical area," citing a "widespread community effort to locate the missing child" that "brought people much closer to this alleged crime than ordinarily occurs," as well as news reports indicating that "the events had 'touched the community at its very core'"); *Pollard v. District Court*, 200 N.W.2d 519, 521 (Iowa 1972) (change of venue was warranted in a case involving an audit that revealed embezzlement from Sioux City accounts, because "[t]he area was flooded with publicity about the audit, the whole matter received much public attention, and the audit pointed to [the defendant] as an alleged offender"); cf. *Fisher v. State*, 481 So. 2d 203, 217-220, 221-222 (Miss. 1985) (change of venue was warranted where pretrial publicity created "substantial doubt" that the defendant could get a fair trial in the venue for the rape and murder of an area student; extensive local news coverage linking the defendant to the crime and revealing other "damning facts" not admissible at trial had "bombarded" the area, and "every one of the prospective jurors" was already familiar with the case). There is no reason to think that those courts would have reached a different conclusion had they applied a "reasonable certainty" standard. Although *Pollard* noted that its standard did not require the defendant to "demonstrate conclusively" that she could not receive a fair trial, 200 N.W.2d at 521, neither did the court of appeals in this case require a conclusive showing.



ment, which ensured that petitioners received a fair trial by an impartial jury. See Pet. App. 141a-150a.

d. Petitioners further contend (Pet. 21-23) that the court of appeals erroneously reviewed their presumed prejudice claim for abuse of discretion, instead of applying de novo review. Petitioner notes (Pet. 21-22) that, while the majority of circuits review decisions whether to transfer venue based on claims of presumed prejudice for abuse of discretion, other courts have reviewed such decisions de novo. See, e.g., *United States v. Skilling*, 554 F.3d 529, 557-558 (5th Cir. 2009), petition for cert. pending, No. 08-1394 (filed May 11, 2009); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

The court of appeals correctly reviewed the district court's ruling on petitioners' change of venue motions for abuse of discretion. This Court has explained that "primary reliance on the judgment of the trial court makes good sense" in reviewing a district court's conduct of voir dire in the area of pretrial publicity, since the trial judge "sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror." *Mu'Min*, 500 U.S. at 427. The same is true of a trial judge's disposition of more generalized claims of community prejudice. As the court below recognized, "[t]he trial court is necessarily the first and best judge of community sentiment and the indifference of the prospective juror." Pet. App. 139a (internal quotation marks and citation omitted). Its decision "to deny the defendants' pretrial change of venue motions without prejudice in favor of proceeding to voir dire was a well-supported



exercise of discretion," and it merits deference. *Id.* at 140a.

In any event, even the courts that apply de novo review to presumed prejudice claims have acknowledged that (1) the government may rebut any such presumption by showing, based on voir dire, that an impartial jury was in fact empaneled; and (2) a district court's determinations of jury impartiality are reviewed deferentially. *Skilling*, 554 F.3d at 557-558, 561; see also *McVeigh*, 153 F.3d at 1179, 1183. Those decisions are consistent with the decision below, which held that voir dire rebutted any presumption of jury prejudice. See Pet. App. 143a. Further review of the issue is not warranted.

e. Finally, petitioners err in contending (Pet. 23-25) that the court of appeals erred in considering evidence from the voir dire process in rejecting petitioners' presumed prejudice claim. Although it is certainly true that voir dire might reveal evidence of actual juror bias, it is well-established that voir dire may also reveal evidence relevant to claims of presumed community prejudice. See, e.g., *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) ("[T]he key to determining the appropriateness of a change of venue is a searching voir dire of the members of the jury pool."); *McVeigh*, 153 F.3d at 1183 (rejecting a claim of presumed prejudice in part because of "the fact that a large number of the venirepersons summoned were not even aware" of some allegedly prejudicial news reports). See generally 2 Charles Alan Wright, *Federal Practice and Procedure* § 342, at 390-392 (3d ed. 2000) ("The courts consider that the existence of prejudice can better be determined by voir dire examination of potential jurors than by affidavits and speculation about the effect of publicity. If the voir dire

produces a satisfactory panel, this is regarded as demonstrating that a transfer is unnecessary.”) (footnote omitted). Indeed, in this case, petitioners themselves “admitted that the district court’s voir dire more thoroughly evaluated the sentiment of the Miami-Dade community.” Pet. App. 140a.<sup>8</sup>

The conduct and outcome of the district court’s seven-day, two-phase voir dire process in this case refutes any claim that pervasive community prejudice deprived petitioners of their right to a fair and impartial jury. Pet. App. 141a, 149a-150a.<sup>9</sup>

3. Petitioner Hernandez challenges (Pet. 29-35) the sufficiency of the evidence supporting his murder con-

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<sup>8</sup> Although petitioners (Pet. 24-25) cite cases in which courts have stated that a district court that has found sufficient support for a presumption of prejudice need not undertake voir dire, they cite no case in which a court has held that voir dire evidence is categorically irrelevant to the inquiry.

Nor does this Court’s decision in *Rideau* support petitioners’ contention. Although the Court in that case presumed prejudice “without pausing to examine a particularized transcript of the voir dire,” 373 U.S. at 727, the petitioner’s confession had been aired three times on television, on one occasion drawing as many as 53,000 viewers, in a community of 150,000 people. *Id.* at 724-727. In contrast, petitioners in this case had argued that the residents of a major metropolitan area should be presumed to be prejudiced based on pretrial publicity concerning matters other than petitioners’ crimes, and based on a survey and an expert affidavit the district court found to be flawed and unpersuasive. The court below did not err in considering the results of the voir dire in evaluating petitioners’ presumed prejudice claims.

<sup>9</sup> Petitioners assert (Pet. 28) that they were prejudiced by “serious misconduct by the prosecution,” namely, statements in its closing argument. The court of appeals rejected that contention, concluding that the alleged misconduct was “minor” and followed by curative jury instructions. Pet. App. 155a (internal quotation marks and citation omitted). Petitioners do not seek review of the court’s conclusion.

spiracy conviction. The court of appeals' factbound conclusion that sufficient evidence supported Hernandez's conviction does not warrant further review.

Even assuming that the government was required to prove that Hernandez and his co-conspirators specifically intended for the shootdown to occur in international airspace, there was sufficient evidence from which a rational jury could conclude that they did so intend. Pet. App. 54a-55a; see also *id.* at 350a (noting that the jury was instructed to determine "whether the shootdown was planned to occur in international airspace"). That evidence included the fact that the shootdown *did* occur in international airspace and that Hernandez and his superiors later congratulated one another on the successful operation. *Id.* at 55a; see also *id.* at 350a-351a.

Petitioners argue (Pet. 31-32) that the fact that Hernandez and his co-conspirators characterized their operations as a response to BTTR's "provocation" shows that they intended to only shoot down the planes if they provoked Cuba by invading its sovereign airspace. The evidence showed, however, that the operation was a direct response to the leaflet drops BTTR executed a month before the shootdown. Pet. App. 4a, 48a. Viewed in the light most favorable to the government, the evidence showed that none of the BTTR planes entered Cuban airspace during those drops. *Id.* at 75a-76a. The jury could therefore infer that, because BTTR's most recent "provocations" were committed in international airspace, the planned confrontation was also to occur in international airspace. See *Jackson v. Virginia*, 443 U.S. 307, 326 (1979) (evidence is sufficient to support a conviction if any rational trier of fact, viewing the evidence in light most favorable to the government, could find guilt beyond a reasonable doubt).

4. Finally, petitioner Hernandez errs (Pet. 35-36) in contending that the court of appeals was required to remand his case for resentencing on his conviction for conspiracy to gather and transmit national-defense information. As the court of appeals explained (Pet. App. 70a-71a), no remand was required because any sentencing error was harmless, given that Hernandez had already been properly sentenced to life imprisonment on the murder count. See Fed. R. Crim. P. 52(a); see also Pet. App. 70a-71a (citing cases).

It is true, as petitioners note (Pet. 35 & n.13) that the Ninth Circuit declined to apply the so-called concurrent sentence doctrine in a similar context in *United States v. Kincaid*, 898 F.2d 110 (1990), explaining that it was “unwilling to place upon [the defendant] the risk that \* \* \* prejudice” from the erroneous concurrent sentence “may manifest itself in the future.” *Id.* at 112. Whatever tension there may be between *Kincaid*’s rejection of the concurrent sentence doctrine and the court of appeals’ harmless analysis in this case, however, there is no developed conflict that would warrant this Court’s review.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**REPLY BRIEF FOR PETITIONERS**

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## REPLY BRIEF FOR PETITIONERS

1. This is a signal case in the international community regarding our nation's commitment to the principle of due process. The petition seeks review of an en banc ruling upholding the only U.S. trial ever condemned by the U.N. Human Rights Commission. The government ignores completely the thirteen *amicus* briefs – filed by, *inter alios*, domestic legal organizations, scholars of the Cuban community, ten Nobel Laureates, foreign parliaments and hundreds of individual legislators (such as multiple former Presidents and Vice-Presidents of the European Parliament), and experts in the American jury process – urging this Court to grant certiorari, apparently more than have ever before been submitted in a criminal case. As the *amici* explain, “No criminal trial in modern American history has received such international approbation” (Laureates Br. 6), such that the decision below undercuts the U.S. Constitution “as a model for the rest of the world with respect to the protection of individual rights and the guarantee of due process of law in criminal trials” (Mexican Senate *et al.* Br. 16). Beyond the important conflicts presented here, given the worldwide attention placed uniquely upon this case, the petition presents “important question[s] of law that . . . should be[] settled by this Court.” SUP. CT. R. 10.

2. The United States does not persuasively answer the petition's showing, supported by the dissent below (Pet. App. 160a-61a), that this Court should review the exceptionally high barriers to securing a change of venue erected by the en banc court. That the Eleventh Circuit took this case en

banc in response to the government's own claim that the panel's "de novo review of the facts" and consideration of "the community's political and social views about issues other than the defendants' commission of the charged crimes" were error (Resp. Pet. for Reh'g En Banc 6) belies the government's newfound contention that this case is not an appropriate vehicle to resolve the four conflicts directly implicated by the ruling below.

*a. The relevance of community prejudice.* The petition and *amicus* briefs demonstrate that "petitioners, because they were agents of the Castro Cuban government, could not have had a fair trial in Miami-Dade County from jurors who would fear the stigma of a not guilty verdict." Cuban-American Scholars Br. 3. Miami civic life is "dominated by the anti-Castro, Cuban American exile community" (*id.* at 4) and pervaded by an "anti-Castro, clandestine, coercive and violent political culture" (*id.* at 13) in which city officials have advocated that "anyone who 'support[s] Fidel Castro' should be legally barred from expressing such views" (*id.* at 14). Militantly anti-Castro factions have perpetrated multiple acts of violence responding to perceived expressions of sympathy for the Castro regime, including a car bombing and an attack on a radio station. Howard Univ. Br. 11-12.

As the government acknowledges, an Eleventh Circuit panel remanded for a new trial on the basis of the violently anti-Castro sentiment in Miami. BIO 8. The en banc majority, however, subsequently reinstated the judgments because "most of the news materials petitioners had submitted did not relate directly to their crimes" (BIO 8): community prejudice,

it held, cannot be shown by "matters that do not directly relate to the defendant's guilt for the crime charged" (Pet. App. 134a), rendering "general anti-Castro sentiment" in Miami irrelevant as a matter of law (Pet. App. 136a).

The Eleventh Circuit's cramped conception of community prejudice not only defies common sense – as illustrated by the uncontested example of a trial of a minority defendant in a pervasively racist community (see Pet. 16) – but also conflicts with decisions of other circuits (see Pet. 17-18). There is no basis in law or logic to deem legally irrelevant a community's hostility towards an entire class, particularly as sharply defined a class as this one. Petitioners maintain not that a fair trial would be denied to "anyone associated with the Cuban government" (*contra* BIO 5), but that they could not receive a fair trial as *admitted agents* of a hated government sent to infiltrate the very organizations lionized by the community in a case in which they were alleged to have contributed to the deaths of two pro-democracy activists. Even those jurors who were not personally infected with hostility would legitimately fear for their safety and economic well-being if they had voted to acquit. Pet. 27.

*b. The standard for securing a change of venue.* In response to the conflict among the circuits and state supreme courts on the foundational question of the test for granting a change of venue, the United States invokes its defense of last resort: that, although the petition is "correct" that "different courts have employed different formulations," "there is no reason to believe . . . that those different formulations have resulted in different outcomes." BIO 23-24.

The petition anticipated that assertion by identifying six courts that consciously chose a lenient standard, rejecting the Eleventh Circuit's "virtual impossibility" test as too strict. Pet. 20. Though the conflict has existed for decades and is implicated by virtually every change-of-venue request, this appears to be the first opportunity in years for this Court to resolve it. Compare *Breecheen v. Oklahoma*, 485 U.S. 909, 911 (1988) (opinion dissenting from the denial of certiorari).

c. *The standard of appellate review.* The United States candidly acknowledges a square conflict between circuits that review the denial of a new-trial motion for "abuse of discretion" and other courts that "review[] such decisions de novo." BIO 25 (citing *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *pet. for cert. pending*, No. 08-1394 (filed May 11, 2009); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999)). See also Pet. 22 (citing additional courts). The conflict is outcome-determinative here: the panel reversed applying de novo review (Pet. App. 303a-04a), whereas the en banc court in reinstating the judgment emphasized its deference to the district court (Pet. App. 139a). The government only reinforces the importance of this Court's intervention by noting that "the courts that apply de novo review" make it "*the government's* burden to show that the district court empaneled an impartial jury" (*Skilling*, 554 F.3d at 562 n.53 (emphasis added); BIO 26), which is a showing that the Eleventh Circuit did not require of the government.

d. *The relevance of voir dire.* The government's principal argument in opposing review is that the

district court conducted a thorough voir dire. BIO 26. But as the petition explained (at 23), that argument collapses the critical distinction between "presumed" and "actual" prejudice: the defining feature of the former is that the community's fear and hostility are sufficiently pervasive that voir dire of individual venire members does not provide a sufficient assurance of a fair trial. In such cases, "a court could not believe the answers of the jurors." *Beck v. Washington*, 369 U.S. 541, 557 (1962). See also Pet. 24 (collecting cases).

Nor is there otherwise merit to the suggestion (BIO 25) that the voir dire renders irrelevant all of the other conflicts that the court of appeals' venue ruling implicates. The court of appeals first held that the community's anti-Castro militancy was categorically irrelevant, that presumed prejudice claims must meet an "extremely heavy" burden, and that it would defer to the district court's judgment (*see supra*), and *only then* held that the voir dire sufficiently protected petitioners under this multi-layered series of reinforcing hurdles to a change of venue. There is no reason to infer that the court of appeals would have affirmed if it had instead considered the community's hostility, reviewed the record de novo, and inquired whether there was a reasonable probability that petitioners would not receive a fair trial.

The United States also significantly overstates petitioners' "expressed satisfaction with the conduct of voir dire" and "the jury ultimately empaneled." BIO 7. It is uncontested that petitioners have always *vigorously* maintained that they could not receive a fair trial in Miami. The government itself acknowledges that petitioners renewed their motion for a



change of venue at trial. BIO 7 n.3. Although petitioners acknowledged the court's efforts to screen out *individual* prejudiced jurors (Tr. 1373-74), even then they immediately challenged whether three of the remaining candidates could "admit their underlying prejudices" (*id.* at 1376).

3. Certiorari is also warranted to review the Eleventh Circuit's holding that petitioners failed to make out a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986). The government conspicuously does not dispute that the rule applied by the Eleventh Circuit conflicts with decisions of this Court and other circuits in two respects.

*First*, the United States itself identifies an important additional circuit conflict that this case would resolve. BIO 17-18. When (as here) a district court requires the government to justify a peremptory strike, the Eleventh Circuit will nonetheless review the opposing party's *prima facie* case. BIO 18 n.5 (citing *United States v. Stewart*, 65 F.3d 918, 924-26 (11th Cir. 1995); Pet. App. 26a)). That holding conflicts with rulings of nine other circuits, which "[i]n contrast to the court of appeals in this case" (BIO 18) read *Hernandez v. New York*, 500 U.S. 352 (1991), to hold that resolution of the ultimate *Batson* question "moots" the *prima facie* inquiry (BIO 17-18 & n.5). The United States' assertion that this conflict "provides an added reason for this Court to *decline* review" (BIO 18 (emphasis added)) makes no sense: the government denies neither that this important conflict is encompassed by the question presented nor that, by granting certiorari and reversing, the Court would resolve that conflict and also vacate the Elev-



enth Circuit's legally erroneous holding that petitioners failed to make out a *prima facie* case.

*Second*, as the petition demonstrated (at 10-14), this Court should review the ruling below that petitioners failed to make out a *prima facie* case under *Batson* because the prosecution did not use all of its peremptory strikes and allowed some African-American jurors to be seated. The United States pointedly denies neither that such a rule conflicts with decisions of this Court and other circuits (Pet. 11), nor that it provides an easily manipulable tool to evade *Batson*'s protections (Pet. 11-12). Instead, the government erroneously suggests that the Eleventh Circuit is just as willing as other courts to consider "other relevant circumstances in evaluating" a defendant's *prima facie* case. BIO 14. But it cites nothing to support that assertion, and the Eleventh Circuit could not have been clearer that it was not considering the totality of circumstances: "the government did not attempt to exclude as many black persons as it could from the jury. The government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror. No *Batson* violation occurred." Pet. App. 27a.

The government notes that the Eleventh Circuit here cited *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987). The decision below correctly reads *Dennis* to announce a *per se* rule: both here and in *Dennis*, the Eleventh Circuit did not consider *any* other facts in finding no *prima facie* case. Thus, although "the *seating* of some blacks on the jury does not *necessarily* bar a finding of racial discrimination" (BIO 13 (quot-

ing *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991) (emphases added)), the Eleventh Circuit erroneously holds that the combination of the seating of an African-American juror *and* the failure to use all available strikes defeats a *prima facie* case.

Though the petition does not present the question whether petitioners ultimately made out a *prima facie* case under *Batson*, it is noteworthy that other circuits would find a *prima facie* case on these facts. Pet. i, 13-14 & n.4. Ignoring the decisions of several courts cited by the petition, the government merely notes that one court once stated in dictum that “supplement[ing] the record” by accepting the “minority percentage of the population” on the venue “as a ‘surrogate’ for the minority population of the venire” is acceptable, but “a thin basis for assigning discriminatory motive to an officer of the court.” BIO 15 (quoting *Soto v. Herbert*, 497 F.3d 163, 172 (2d Cir. 2007)). The United States does not explain why that quotation is particularly relevant: even that decision reiterates that such an inference is acceptable, and the government does not dispute that in this case the number of strikes was grossly disparate to the number of available minority jurors, just as it has never disputed on appeal that petitioners made out a *prima facie* case under *Batson*.

Petitioners’ *prima facie* case furthermore does not rest “solely on a comparison between the percentage of the government’s available peremptory challenges used to strike African-American venirepersons and the percentage of African-Americans in the population of Miami-Dade County.” *Contra* BIO 14-15. The government, for example, struck one African-

American venireperson who “was an elderly woman who had never served on a jury before” and “had absolutely no baggage in her background” and a second who was “actually employed in the law enforcement field.” Pet. App. 417a-18a. That the government was striking jurors like these suggested racial motivation in the context of the widely acknowledged “tension between the black population and the Cuban American community . . . over the government’s approach to Cuba.” Nat’l Lawyers Guild Br. 16.

The United States finally contends “[i]n any event” that “the government’s strikes were non-discriminatory” (BIO 15) “regardless of whether a *prima facie* case was made out” (BIO 17). But the petition does not present the ultimate question whether “the government’s peremptory challenges were based on race” (*contra* BIO i), which the Eleventh Circuit would instead resolve on remand.

4. There is no better illustration of the prejudice petitioners suffered – and of the reason for the “widespread international condemnation of petitioners’ trial” (Ibero-American Federation of Ombudsman *et al.* Br. 17) – than the conviction of petitioner Hernandez (and resulting *life sentence* he received) for conspiracy to commit murder. It is now common ground that “the government was required to prove that Hernandez and his co-conspirators specifically intended to for the shutdown to occur in international airspace.” BIO 28 (citing Pet. App. 350a). Contrary to the government’s submission (BIO 28), the question is not fact-bound, as the United States does not dispute that the Eleventh Circuit erred as a matter of law in failing to “scrutinize the record . . . with special care in [this] conspiracy case” (*Anderson*

*v. United States*, 417 U.S. 211, 224 (1974), given the significant risk of conviction on the basis of “equivocal” conduct (*Ingram v. United States*, 360 U.S. 672, 680 (1959)). See Pet. 34.

As to the record evidence, the United States ignores the utter implausibility of its own theory of the case: that Cuba complained bitterly to the United States about incursions into its territory, then took the lunatic step of effectively declaring war by purposefully shooting down civilian aircraft in international airspace. The petition also fully anticipated the vanishingly thin evidence invoked by the United States. In fact, there is no evidence of Hernandez’s intent *at all*: the government candidly admitted that such a requirement presented an “insurmountable” hurdle to the prosecution. Emergency Pet. for Writ of Prohibition at 21, No. 01-12887 (11th Cir. May 25, 2001). As the petition explained (at 33), the fact that “Hernandez and his superiors later congratulated one another on the successful operation” (BIO 28) strongly supports Hernandez’s *innocence*, given that Cuba maintained (and its radar showed) that the shootdown occurred over its own airspace. The government’s further reliance on “the fact that the shootdown did occur in international airspace” (BIO 28) says nothing about Hernandez’s intent and is nothing more than a plea to eliminate *any* requirement that it prove intent at all. That fact also proves almost nothing inferentially – it is undisputed that the speed of the BTTR planes and Cuban planes and missiles makes it entirely possible that a shootdown over international waters was not planned. Pet. 33. Nor could the jury fairly “infer” that “because BTTR’s most recent ‘provocations’ were committed in interna-

tional airspace, the planned confrontation was also to occur in international airspace.” *Contra* BIO 28. As noted, Cuba’s complaint was that the United States was permitting illegal incursions into its airspace, and it is ridiculous to believe that Cuba planned to commit an act of war by murdering civilian pilots lawfully flying over international waters. At the very least – as is apparent from the dissent below and dubitante concurrence – any such “inference” does not come close to establishing proof “beyond a reasonable doubt.”

5. Certiorari is finally warranted to review the Eleventh Circuit’s refusal to remand for resentencing of petitioner Hernandez. Pet. 35-36. Like the ruling below, the government acknowledges a square conflict between several circuits and the Ninth Circuit, which “declined to apply the so-called concurrent sentence doctrine in a similar context in *United States v. Kinkaid*, 898 F.3d 110 (1990).” BIO 29 (quoting 898 F.3d at 112). Contrary to the government’s unelaborated statement that “there is no developed conflict that would warrant this Court’s review” (BIO 29), not only is the conflict acknowledged, but the Ninth Circuit’s position is correct, at least in a case such as this one, in which the district court deserved an “opportunity to consider what sentence is appropriate upon a legally correct application of the Sentencing Guidelines” in the wake of *United States v. Booker*, 543 U.S. 220 (2005). Fl. Assoc. of Criminal Defense Lawyers Br. at 8; *see also* Pet. 36. Indeed, the United States does not argue to the contrary.

Given the important conflicts in the lower courts directly implicated by the rulings below, as well as the singular importance of this case in the eyes of the

international community to the commitment of the United States to the principle of due process, certiorari should be granted.

# CONCLUSION

The petition for certiorari should be granted.

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IN THE  
**Supreme Court of the United States**

RUBEN CAMPA, RENE GONZALEZ, ANTONIO  
GUERRERO, GERARDO HERNANDEZ, AND LUIS  
MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Eleventh Circuit  
CERTIORARI

**BRIEF AMICUS CURIAE OF THE CENTER  
FOR INTERNATIONAL POLICY AND THE  
COUNCIL ON HEMISPHERIC AFFAIRS IN  
SUPPORT OF PETITION FOR CERTIORARI**

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--------------------	---

JOHN F. O'CONNOR, *Good Faith in International Law*

(1991) p. 124.....	9
--------------------	---

Bureau of Democracy, Human Rights, and Labor,  
*2008 Human Rights Report: Cuba* (2008).

<a href="http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119155.htm">http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119155.htm</a> .....	11
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## INTEREST OF THE AMICUS CURIAE

The Center for International Policy ("CIP") was founded in 1975 to promote a U.S. foreign policy based on international cooperation and respect for basic human rights. To that end it offers timely policy analysis and in-depth reports on key issues in the Western Hemisphere.

The Council on Hemispheric Affairs ("COHA") is a thirty-year-old, tax-exempt research group that monitors the full scope of U.S.-Latin American relations. It has been described on the Senate floor as one of the nation's most respected bodies of scholars and policymakers.<sup>1</sup>

CIP's Cuba Program is probably the most active of that of any international policy institute in the United States. The program was founded in 1992 by Wayne S. Smith, Ph.D., who has served uninterruptedly as its Director ever since.

Dr. Smith has been involved in US-Cuban relations for over fifty years, beginning with his transfer to Havana as a Foreign Service Officer in 1958 where, not long after his arrival, he witnessed Fidel Castro's entry into Havana riding on a tank. Smith was the Third Secretary in our embassy in Havana when the United States severed diplomatic

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<sup>1</sup> In accordance with Supreme Court Rule 37.2(a), amici CIP and COHA have obtained written consent to the filing of this brief from counsel of record for both parties. Those letters of consent are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, amici curiae certify that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae or their counsel.

relations with Cuba on January 3, 1961.

In 1977, Dr. Smith was part of the American diplomatic delegation that opened the bilateral talks with Cuba that led to the opening of interests sections in Washington D.C. and Havana in September of that year. Shortly thereafter, Smith became Director of Cuban Affairs in the Department of State. In 1979, he was transferred to Havana as Chief of Mission of the U.S. Interests Section. He remained in that position until 1982.

Following retirement from the Foreign Service on a point of principle involving U.S. policy toward Cuba, Smith joined the Carnegie Endowment for International Peace where he worked on US-Cuban relations. In 1983, he began teaching at the Johns Hopkins School of Advanced International Studies ("SAIS") on US-Cuban relations. While at SAIS, he published his best-known book, *The Closest of Enemies: A Personal and Diplomatic History of the Castro Years*.

Dr. Smith, both as a diplomat and as Director of CIP's Cuba Program since that program's inception, has insisted on the importance of Cuba adhering to the norms of the international law of human rights. He and CIP expect no less of the United States and are deeply concerned by the April 8, 2004 decision of the Working Group on Arbitrary Detention of the United Nations Human Rights Commission that the "climate of bias and prejudice against the accused" was so extreme that the proceedings failed to meet the "objectivity and impartiality that is required in order to conform to the standards of a

fair trial” and “confer[red] an arbitrary character on the deprivation of liberty” in this case.<sup>2</sup> Amicus CIP is additionally troubled by the startling fact that this is the first and only occasion that the U.N. Human Rights Commission has found a trial conducted in a United States federal court to have been unfair.

Amicus COHA shares CIP’s concerns as to the fairness of the criminal trial Petitioners received. Those concerns are based on the fact that the Miami, Florida venue of Petitioners’ trial made it impossible for an unbiased jury to be empanelled. This conclusion is inescapable in light of the atmosphere of pervasive anti-Castro hostility that exists as a product of history in that city.

Further, amici CIP and COHA have noted with concern for this country’s standing in the hemisphere, that numerous Latin American parliaments and parliamentary committees have protested the trial of the Petitioners as fundamentally unfair. They are identified in the Appendix to the Petition for a Writ of Certiorari at 469A to 488A, and include: the Latin American Parliament, MERCOSUR Parliament, Chile’s Senate Human Rights, Nationality and Citizenship Commission, Bolivia’s National Senate and House of Deputies, Brazil’s House of Deputies’ Human Rights and Minorities Commission, the Chairs of twenty-four Parliamentary Commissions of Brazil’s National Congress, Mexico’s Senate, the Mexican Senate’s North American Foreign Relations Committee, Mexico’s House of Representatives, the

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<sup>2</sup> Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc.E/CN.4/2006/7/Add.1, at 65.



President and Vice-President of Panama's National Assembly and the President of its Commission of Foreign Relations, the Foreign Relations Commission of Panama's National Assembly, Paraguay's House of Deputies, Peru's Congress and Venezuela's National Assembly.

Amici curiae's interest in this case arises both from their commitment to human rights throughout the Americas and from their conviction that if the United States is to speak with moral authority on that subject to the countries of this hemisphere – including Cuba – it must honor, in law, practice and spirit, the basic human right to a fair trial that is guaranteed by international law to all persons, including Cubans, who are tried as criminal defendants before this nation's courts.

## SUMMARY OF ARGUMENT

The reputation of the United States as the indispensable and final guarantor of the human rights of non-citizens tried in its courts is at stake in this case.

There is an overwhelming legal and public record in support of Petitioners' contention that they were denied their fundamental right to a fair trial. They were denied a fair trial because they were refused an impartial tribunal to determine their guilt or innocence.

Their convictions were the inevitable outcome of the denial of their collective request for a change of venue. That meant that they would be tried in a community rife with ingrained hatred for the government of Cuba. Entirely predictably, that hatred jelled into a systemic bias against the Petitioners because of the charges against them in being agents of that government.

Indeed the hatred of the government of Cuba was so pervasive in Miami as to create a presumption of bias in every citizen called to jury service in this case. That presumption simply cannot be rebutted with the degree of certainty required in a matter where life sentences were sought and obtained. Further, to the extent citizens of Miami do not actually hate what is routinely referred to there as the "Castro regime," they nevertheless must be reasonably assumed to be intimidated by the ubiquity of that emotion in the community to which they must return to work and live on the completion of their jury service.

A changed venue was the *only* way in which Petitioners could have actually realized their universal human right to a fair trial. The Eleventh Circuit's

holding that Petitioners were not entitled, in the objective circumstances of the emotional climate prevailing in Miami at the time, to have their trials moved as a matter of right to Fort Lauderdale constitutes a breach of this country's obligation to honor the explicit treaty obligations it incurred as a result of its ratification of the International Covenant on Civil and Political Rights (ICCPR).

## ARGUMENT

### **I. The United States is in Breach of its Treaty Obligations to Ensure that Petitioners Received a Fair Trial**

The foundational human rights document of the modern era, the Universal Declaration of Human Rights, declares at Article 10 that "every person has an equal right to a fair and public trial, by an independent and impartial Court."<sup>3</sup> The Declaration's assertion of an elemental and universal human right to a fair trial – defined in this case as the right to an impartial trier of fact (i.e. an unbiased jury) – found its second expression at Article 14(1) of the International Covenant on Civil and Political Rights<sup>4</sup>, which imposes on all parties – including, of course, the United States – the duty to provide anyone on trial for a criminal offense with "...a fair...hearing by a[n]...impartial tribunal..."

The Covenant is a treaty and therefore under the Supremacy Clause of the Constitution its obligations are a constituent part of the law of this land.<sup>5</sup> Thus, the denial of an impartial tribunal to Petitioners constituted a discrete violation of this country's governing law pertaining to criminal trials.

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<sup>3</sup> Adopted and proclaimed by General Assembly Resolution 217A (III) of December 10, 1948.

<sup>4</sup> Concluded at New York, Dec. 16, 1966. Entered into force, Mar. 23, 1976. 999 U.N.T.S. 171. Signed by the United States, Oct. 5, 1977. Ratified by the United States, June 8, 1992. Entered into force for the United States, Sept. 8, 1992.

<sup>5</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...*" U.S. CONST. art. VI, § 1 (emphasis added).

Moreover, treaties are the highest obligation of international law.<sup>6</sup> As Professor Louis Henkin has said, "International law is law for the United States. As such, it is obligatory upon all whose actions are attributable to the United States under international law: it is binding on Congress, and on the President and the Executive branch [and] the *federal courts*, from the Supreme Court down to the federal magistrate..."<sup>7</sup>

As a party to the ICCPR, the United States is subject to the principle of public international law expressed as *pacta sunt servanda*. Article 26 of the Vienna Convention on the Law of Treaties explicitly translates that Latin to mean: "Every treaty in force is binding upon the parties and must be performed by them in good faith."<sup>8</sup>

The distinguished Werni Levi offers the following comment on the meaning of good faith in public international law: "In general, it [good faith] requires that a party must carry out obligations honestly, without mental reservations or deceitfulness and *must fulfill the letter and spirit of a commitment*."<sup>9</sup>

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<sup>6</sup> See Restatement, Third of the Foreign Relations Law of the United States, §102 (3) "International agreements create law for the states parties thereto ..."

<sup>7</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* (2d ed. 1996) p. 233. (Emphasis added). See also *The Paquete Habana*, 175 U.S. 677, at 700 (1900): "...international law is part of our [U.S.] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

<sup>8</sup> U.N. Doc. A/CONF. 39/27 (1969), done at Vienna on May 23, 1969; entered into force on January 27, 1980. The United States is a party to the Vienna Convention.

<sup>9</sup> WERNI LEVI, *CONTEMPORARY INTERNATIONAL LAW* (1991) p. 195. (Emphasis added). See also JOHN F. O'CONNOR, *GOOD*

At the risk of belaboring something so plain, as a party to the International Covenant on Civil and Political Rights the United States is inescapably bound to honor – in truly good faith – the letter and the spirit of Article 14(1) of that treaty. The Eleventh Circuit's holding that Petitioners were not entitled to a change of venue – the only protection available to them from the bias engendered by a palpably ambient hostility in Miami – fails the obligation of good faith required of this country as a result of its ratification of the ICCPR. Both the letter and spirit of Article 14(1) required, in view of the Petitioners' obvious vulnerability, a change of venue.<sup>10</sup>

## **II. The Failure of the United States to Ensure that the Petitioners Received a Fair Trial Has Important Foreign Policy Implications that Warrant the Grant of Certiorari**

President Obama promised in his campaign to pay greater positive attention to Latin America by

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FAITH IN INTERNATIONAL LAW (1991) p. 124, where Professor O'Connor concludes that: "The principle of good faith in international law is a fundamental principle ... directly related to honesty, fairness and reasonableness."

<sup>10</sup> The fact that the jury in this case found Petitioner Hernandez guilty of conspiracy to murder puts every other verdict in this case in extreme question. Because of its sheer absurdity the conviction of Hernandez on that charge is proof that the jury would convict anyone charged with being an agent of the Cuban government of anything. To find him guilty of conspiracy to murder, the jury had to find beyond a reasonable doubt that he participated in a conspiracy that had as its intention the shooting down of aircraft outside of Cuban airspace. Not only was there no evidence of such an intention, there is no logic to support such a ridiculous plan. It is public record that Cuba was angered at the time by penetrations of its airspace and no doubt intended to greet the next one with MIGs. But under what conceivable theory would it be preferable for Cuba to shoot planes down in international air space, rather than its own?

engaging with the region on terms of mutual respect. Many countries in the hemisphere have criticized the United States attitude toward Cuba and have signaled that, as part of any U.S. review of its overall policy toward Latin America, they specifically wish to see a change of policy toward Cuba from one of constant confrontation to one of constructive engagement. For example, in an open message to the United States, within two weeks of President Obama's election, the Rio Group of Latin American nations approved Cuba as the organization's twenty-third member.<sup>11</sup>

The desire of Latin America for a shift of U.S. policy toward Cuba is further corroborated by the fact that seven Latin American presidents have visited Cuba since the beginning of this year. Those visits must be seen as a demonstration of support for that country in the face of what is widely viewed as the punitive policy (chiefly, the current embargo) of the United States.<sup>12</sup> Meanwhile the State Department has issued its 2008 Human Rights Report on Cuba.<sup>13</sup> Among the "human rights problems" it identifies is the "denial of fair trial[s]." When the United States is seen to be guilty of "do as I say, not as I do" conduct, this country's reputation and influence suffer, which is precisely what has happened throughout the hemisphere in what is referred to popularly as the case of "the Cuban Five." In short, this case has important foreign policy implications

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<sup>11</sup> See *Rio Group accepts Cuba*, Latin American Herald Tribune, November 15, 2008. Other members are Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela.

<sup>12</sup> Each head of state denounced the U.S. embargo during his or her visit to Cuba.

<sup>13</sup> <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119155.htm>



for the United States at a critical time in its relations with Latin America.

The foreign policy implications of this case are confirmed by the number of Latin American parliaments and parliamentarians (identified on pages 3 and 4, *supra*) that have protested Petitioners' trial as unfair. It is not the role of the Supreme Court to decide issues of foreign policy with respect to Cuba or any other country. However, as Petitioners argue in their Brief, certiorari should be granted when the actual disposition of a case "implicates serious issues of foreign relations." (*JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964)).

## CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

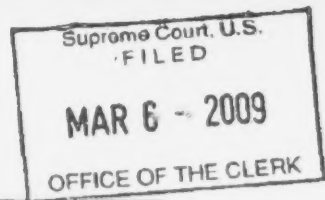
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No. 08-987



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IN THE  
**Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**BRIEF OF THE CIVIL RIGHTS CLINIC AT  
HOWARD UNIVERSITY SCHOOL OF LAW AS  
AMICUS CURIAE IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

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IN THE  
**Supreme Court of the United States**

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No. 08-987

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**BRIEF OF THE CIVIL RIGHTS CLINIC AT  
HOWARD UNIVERSITY SCHOOL OF LAW AS  
AMICUS CURIAE IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

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**STATEMENT OF INTEREST**

*Amici curiae* are the Dean and the Civil Rights Clinic of Howard University School of Law. We submit this brief in support of the petitioners' request for a writ of certiorari in order to respectfully urge this Honorable Court to reverse the decision of the Eleventh Circuit that the petitioners did not establish a right to a change of venue.

For one hundred and forty years Howard University School of Law has trained lawyers to be public



servants and social engineers. In pursuit of that mission the school places the defense of human rights at the heart of its educational practice. When more than seventy years ago Charles Hamilton Houston, a former Howard Law Professor and Dean, and the late Justice Thurgood Marshall, a former Howard student, developed the winning legal strategy challenging the pernicious separate but equal racial segregation doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), their fight was not only against racial subordination, but also against all forms of injustice that would deny human beings the full due process and equal protection promise of the United States Constitution.

By refusing petitioners' request for a change of venue a mere thirty miles away from Miami, Florida, the Eleventh Circuit ordered five agents of the government of Fidel Castro to stand trial at the epicenter of the anti-Castro movement in the United States. In so doing, the court guaranteed that jurors would be drawn from a cross section of a community inflamed by passion, warped by prejudice, awed by violence, and menaced by the virulence of public opinion. In that poisoned atmosphere, petitioners had no more of a fair chance of impartial justice than black defendants before all-white juries during the Jim Crow era.

### **SUMMARY OF REASONS FOR GRANTING THE WRIT**

Under the Sixth Amendment to the Constitution, criminal defendants have the right to be tried by an impartial jury selected from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). At the heart of the fair cross section doctrine is the principle that a defendant's fellow citizens will

judge a case fairly and neutrally when they represent the entire community and not simply one segment of it. *Taylor*, at 530. But a jury made up of a cross section of the community can never be fair when that community is so inflamed by passion and so warped by prejudice that the jury becomes the very thing for which it was intended as a corrective: the arbitrary application of government power, the expression of irrational bias, and a threat to individual liberty. See *Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971).

The 2001 trial of the petitioners in Miami, Florida took place in a historical, social and political milieu in which the community perceived petitioners as the embodiment of an evil regime. In Miami Florida, circa 2001, being an agent of the Castro government in effect meant being a member of a minority group, despised by broad cross sections of the population, subjected to violence by radical fringe groups, and removed from the consideration of mainstream society and the protection of law enforcement. In other words, agents of the Castro government standing trial in Miami, Florida in 2001 had no more of a chance of impartial justice than black defendants before all white juries during the Jim Crow era.

In arguing that petitioners were no more likely to obtain a fair trial in Miami Florida than black defendants in the Jim Crow South, *amici* do not claim that present day Miami, Florida society is the contemporary reiteration or moral equivalent of Jim Crow society. We merely aim to show that the same conditions that made it impossible for Jim Crow jurors to see beyond the race of defendants also made it impossible for Miami jurors to see beyond petitioners' Castro connection.

## REASONS FOR GRANTING THE WRIT

As far back as the 1940's, this Court identified the fair cross section doctrine as calling for a jury "truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940); see also *Glasser v. United States*, 315 U.S. 60, 86 (1942). Thirty years later, the Court elevated that doctrine to a constitutional requirement when it held, in *Taylor v. Louisiana*, that a jury is more likely to be impartial if it is composed of representatives of all segments and groups of the community, who together create a body capable of exercising "the commonsense judgment of the community." 419 U.S. 522, 530 (1975). The *Taylor* Court explained that in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, "our 'notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government.'" *Id.* (quoting *Glasser v. United States*, 315 U.S. 360 (1942)). As part of the democratic system and as an expression of representative government, "the purpose of a jury is to guard against the exercise of arbitrary power-to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor*, 419 U.S. at 530, (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

However, the fair cross section doctrine is a means, not an end. In the words of the Court, "[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." *Holland v. Illinois*,

493 U.S. 474, 480 (1980). Thus, the fact that a jury is drawn from a cross section of the community does not necessarily guarantee a fair trial when the community itself is so fundamentally hostile to the defendants that the very environing atmosphere of the trial becomes irredeemably poisoned:

There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action.

*Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971).

We do not lack for examples from our recent past of criminal trials by jurors too inflamed by passion, too warped by prejudice, too awed by violence, and too menaced by the virulence of public opinion to render a fair verdict. See *Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45 (1936); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Shepard v. Florida*, 341 U.S. 50 (1951); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Downer v. Dunaway*, 1 F. Supp. 1001 (D. Ga. 1932); *State v. Wilson*, 158 So. 621 (La. 1935); *Browder v. Commonwealth*, 123 S.W. 328 (Ky. Ct. App. 1909); *Ex Parte Hollins*, 14 P.2d 243 (Okla. Crim. App. 1932). The common denominator in virtually all of these cases is a set of historical, social and political conditions that make it virtually impossible for the jury to serve its proper functions of safeguarding liberty, protecting citizens from arbitrary government power, and determining guilt or innocence. These conditions, which used to be present in the Jim Crow era and are sadly prevalent in present-day Miami, Florida are: 1) the presence of

a universally despised minority group; 2) the use of violence by radical fringe groups; 3) the toleration of that violence by mainstream society; and 4) the suppression of any dissenting voices.

# **I. THE PASSIONS OF THE ANTI-CASTRO MOVEMENT POISONED THE ENVIRONING ATMOSPHERE OF PETITIONERS' TRIAL AND SERVED AS AN INSURMOUNTABLE IMPEDIMENT TO DUE PROCESS**

To be exiled from one's homeland, Dante wrote in the *Divine Comedy*, is to "leave everything you love most."<sup>1</sup> For nearly half a century, Cuban life in the United States has often sounded like an echo of the poet Ovid's lament upon his expulsion from Rome: "exile is death."<sup>2</sup> For many Cuban-Americans, living at the epicenter of the Anti-Castro movement in Miami, Florida, the passage of time seems to have done little to dampen their passionate hatred of a regime they believe banished them into exile. *Amici* respectfully submit that it is neither a sign of indifference toward the sincerity of that sentiment, nor even a point of disagreement with the politics of their cause to conclude, as the Eleventh Circuit should have done, that jurors drawn from a cross section of that community can never render a fair and impartial judgment on the criminal guilt or innocence of the very people they believe are keeping them from returning home.

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<sup>1</sup> Dante Alighieri, *The Divine Comedy of Dante Alighieri: Paradiso*, 148 (trans. Allen Mandelbaum University of California Press 1982).

<sup>2</sup> See Joe Marie Claassen, *Displaced Persons: The Literature of Exile from Cicero to Boethius* 160 (1999).

Shortly after the triumph of the Cuban Revolution, relations between Cuba and the United States began to sour. See Hernando Calvo & Katlijn Declercq, *The Cuban Exile Movement: Dissidents or Mercenaries* 1 (2000). Many Cubans who supported the Revolution felt betrayed when Castro's nationalist campaign turned into a Communist regime. Richard R. Fagen, et. al. *Cubans in Exile* 34 (1968). Once in power, Castro seized and nationalized private industries, imposed limits on the size and quantity of land holdings, and set up a revolutionary tribunal which sentenced thousands of Cubans to either prison or death by fire squad. Robert M. Levine, *Secret Missions to Cuba* 29, 31-33 (2001).

Soon thereafter, the island experienced a mass exodus of Cubans to the United States. Levine, *supra* at 33. These exiles, mainly consisting of upper and middle class educated and affluent whites opposed to Castro's revolution, had been rendered virtually destitute with the communist takeover. *Id.* at 42-3. Miami became the central hub for an exile community, whose members shared an abiding desire to overthrow the Castro government and regain the life they had lost when Cuba became a communist country. See generally *Miami Now* 83 (Guillermo J. Grenier & Alex Stepick III eds. 1992).

One of the first such anti-Castro movements in Miami was the Pedro (Peter) Pan airlift of Cuban children to Miami. Levine, *supra*, at 43-44. With funding from the CIA and other government agencies, children from Cuba were airlifted to the United States and separated from their parents based on rumors that the Castro regime planned to ship them to Soviet education camps for indoctrination. *Id.* Some of the Pedro Pan youths later became



prominent businessmen and politicians in Miami. *Id.* One such individual, Joe Carrollo, became mayor of Miami. *Id.* at 45.

The years immediately following the revolution witnessed several events that would further polarize Cuban and American communities on the mainland from those on the island: the Bay of Pigs, the Cuban Missile Crisis, Operation Mongoose, etc. *See generally* Hernando Calvo & Katlijn Declercq, *The Cuban Exile Movement* (2000).

The Bay of Pigs was a failed attempt by exiles at invading Cuba. Levine, *supra*, at 52-53. The failed invasion resulted in the deaths of over one hundred Cuban exiles and the capture of 1,189 exiles. *Id.* Some of the captured exiles were released for a ransom of \$53 million, paid by the United States government as a result of pressures placed on Washington by Miami's exile community. Levine, *supra*, at 54.

Shortly after the Bay of Pigs, President Kennedy approved Operation Mongoose, which aimed at overthrowing Cuba's government. *See* Calvo & Declercq, *supra*, at 7-8. Castro turned to Soviet support, which led to the construction 388 surface-to-air missiles in Cuba and created a real threat of nuclear strikes against the United States. *Id.* While the missile crisis was eventually diffused in 1962, anti-Castro sentiment in the United States continued unabated. Jane Franklin, *Cuba and the United States: A Chronological History*, 66 (1997). In July 1963, the Organization of American States voted 14 to 1 to for a hemispheric ban on travel to Cuba, and the Kennedy administration tightened the embargo that it had placed on the country over a year prior. *Id.*



Elements of the Cuban exile community, including such prominent figures as Jorge Mas Canosa and Luis Posada Carriles, launched their own private crusade to violently oust Castro. See Ann Louise Bardach, *Cuba Confidential: Love and Vengeance in Miami and Havana*, 171 (2002). While Canosa provided the public face with successful businesses and lobbying organizations, Posada Carriles manned the violent and radical wing of the operation where he “remained in the shadows, consorting with intelligence operatives, anti-Castro militants, mercenary assassins and, according to declassified documents, reputed mobsters.” *Id.* at 175.

During the mid 1960s, Carriles participated in a host of terrorist activities based out of Miami supported and funded by the CIA. Bardach, *Cuba Confidential*, *supra* at 183. Before falling out of grace with the CIA and moving to Venezuela, Carriles aligned himself with Orlando Bosch, who spent four years in federal prison for firing a 57-milimeter cannon into a Polish ship docked in the Port of Miami. *Id.* at 183-84. The efforts of Carriles and Bosch culminated in the bombing of a Cuban commercial airliner carrying Cuba’s national fencing team. *Id.* at 189-90.

Upon returning to the United States after a questionable acquittal in a Venezuelan court in 1986, Bosch was arrested, quickly becoming the “cause célèbre among the exile leadership.” *Id.* at 201. Many prominent members of the exile community stepped forward to defend him. Representative Ileana Ros-Lehtinen, whose campaign was managed by former Governor Jeb Bush, ran on the issue of Bosch’s release. *Id.* at 201-02. Others went as far as to call in bomb threats to the Immigration and

Naturalization Services facility in which Bosch was being held. *Id.* at 202. Despite the recommendation of his own Justice Department, which found that Bosch “has been resolute and unwavering in his advocacy of terrorist violence [for thirty years],” President George Bush expedited Bosch’s release, later granting him United States residency. *Id.*

Other examples of the extremist anti-Castro sentiment present in Miami include the creation and continual operation of anti-Castro paramilitary groups among the exile community. See Calvo & Declercq, *supra*, at 19. One such group is the Alpha 66, which operates a military training camp forty-five minutes outside Miami’s city limits. *Id.* at 25-26. A United States Senate special committee investigation revealed the “Alpha 66 along with the CIA participated in at least two assassination attempts against Fidel Castro.” *Id.* at 25. Although the investigation also revealed that Alpha 66 had the “motives, capacity, and resources to assassinate President Kennedy,” the Miami Commission helped finance the group by giving it \$100,000 in 1982. *Id.*

The silencing of all speech conciliatory towards Cuba has manifested in every aspect of Miami life and is actively supported by the Miami municipal authorities. In early 2006, the anti-Castro community lobbied the Miami school board to ban a children’s book, which appeared to portray Cuba in a positive light. *Am. Civil Liberties Union v. Miami-Dade*, 439 F.Supp.2d 1242, 1247 (S.D. Fla. 2006). The community compared the book to devil worship and deemed it propaganda for the Castro regime. Rob Jordan, *Commie Book Ban; Vamos a Cuba has Become an Unlikely Lightning Rod*, Miami New Times, Aug. 10, 2006, at 1. The School District banned the book,

overruling a previous decision made by the board, which normally decided such matters. *Am. Civil Liberties Union*, 439 F.Supp.2d at 1157. In July of 2006, the United States District Court for the Southern District of Florida ruled that the School District's banning of the book violated the constitutional protections of free speech. *Id.* at 1272.

In 1988, the Cuban Museum of Arts and Culture became a site of controversy. *City Museum of Art's and Culture, Inc., v. Miami*, 766 F.Supp. 1121, 1122 (S.D. Fla. 1991). At the time, the museum was auctioning off works by Cuban artists who lived in Cuba or had not openly renounced the Castro government. *Id.* The night of the auction, a work by a Cuban artist was auctioned off and then set on fire near prominent Ronald Reagan Ave. Lissette Corsa, *Art to Burn*, Miami New Times, April 8, 1998, at 1. After the incident, the museum faced a barrage of threats from anti-Castro exiles. *City Museum of Arts and Culture, Inc.*, 766 F.Supp.1121, 1122. One member of the board was injured by a car bomb, while each board member was pressured to resign. *Id.* at 1123. The Miami City Commission attempted to shut down the Museum by, among other things, revoking its non-profit status. *Id.* When the Museum's lease ended in 1991, the City Commission refused to renew it. *Id.* at 1124. In time, the United States District Court for the Southern District of Florida would find that the City's actions had violated the First Amendment. *Id.* at 1131.

In the early 1990's, anti-Castro exiles often staged marches of protest near the radio station which aired Fransisco Aruca, an advocate for open trade with Cuba and radio talk show host. Clara Germans, *Cool Cuban Heats Miami Tempers*, The Christian Science

Monitor, April 7, 1992. These protesters smashed in the station's windows and threatened the commercial sponsors of Aruca's radio show. *Id.*

## II. THE POLITICAL AND SOCIAL DYNAMICS OF THE JIM CROW ERA POISONED THE ENVIRONING ATMOSPHERE OF RACE-DOMINATED CRIMINAL TRIALS AND SERVED AS AN INSURMOUNTABLE IMPEDIMENT TO DUE PROCESS

The intransigence and violence of the anti-Castro movement poisoned the atmosphere of petitioners' trial in the same fashion as the intransigence and violence of Jim Crow society poisoned criminal trials where race was at issue. This is not to say that Miami, Florida is the contemporary reiteration or moral equivalent of Jim Crow society. To make such a claim would be both insupportable and an undeserved affront to the majority of the Cuban-American community. Rather, the point is that agents of the Castro government summoned in the minds of Miami jurors the same emblem of fear and loathing that black defendants conjured in the imagination of white Jim Crow jurors. A brief history of Jim Crow society and the race-dominated criminal trials it engendered may help make the point clear.<sup>3</sup>

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<sup>3</sup> The history of Jim Crow society has been amply documented by social scientists, legal scholars and this very Court. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624 (1985); James W. Fox, *Imitations of Citizenship: Repressions and Expression of Equal Citizenship in the Era of Jim Crow*, 50 How.L.J. 113 (2006); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

**A. Jim Crow society was marked by an Atmosphere of profound racial hostility, violence against blacks by radical groups, the toleration of that violence by mainstream society, and the silencing of dissenting voices.**

At the conclusion of the Civil War, newly freed slaves represented a universally despised minority. See David M. Chalmers, *Hooded Americansim: The History of the Klu Klux Klan* 3rd Ed. 11-14 (1987). In the South, formerly dominant whites "lived with fears that their land might well become" subject to "black insurrection." *Id.* Racial tension mounted, which led to race riots, and ended with Blacks running away to hide in wooded areas. *Id.* at 14. In the north, the growing migration of blacks to urban cities engendered discrimination in public accommodations and deteriorating racial attitudes. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 12 (2004).

Out of this cauldron of racial hostility emerged the Jim Crow era of state-sanctioned racial apartheid, during which the South explicitly adopted, and the North tacitly tolerated, a racial caste system designed to maintain white supremacy and black inferiority. Pursuant to that system, the races were formally segregated in virtually all areas of social and public life, including in schools, transportation and accommodations, work, church and marriage. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 Duke L.J. 624 (1985).<sup>4</sup> A

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<sup>4</sup> This Court, in *Plessy v. Ferguson*, initially upheld the racial caste system and it would take not only *Brown v. Board of Education*, 347 U.S. 483 (1954) but a host of other decisions to

majority of Southern states adopted poll taxes and literacy tests to suppress the black vote, racial disparity in educational spending became enormous, and legislatures adopted new measures for coercing black agricultural labor. See Klarman, *supra*, at 10-11.

Social segregation was enforced by physical violence. See David Chalmers, *Backfire, How the Ku Klux Klan Helped the Civil Rights Movement* 15-17 (2003). The number of blacks lynched each year rose dramatically. *Id.* The Ku Klux Klan and other violent groups arose, with the purpose of destroying Black "political effectiveness" by terrorizing blacks and northern Republicans in order to maintain white supremacy. See Chalmers, *Hooded Americansim, supra*, at 14-18. Klan members printed threats in local papers, posted warning on trees, and ordered masked gunmen to ride around town near Republican meetings and the homes of whites and blacks who supported reconstruction. William L. Katz, *The Invisible Empire: The Klu Klux Klan Impact on History*, 31 (1986). If warnings proved ineffective, Klan members "set fires to barns, homes, and meeting halls." *Id.* Teachers were whipped, branded, murdered, and driven out of state for instructing black children. *Id.* at 42; see also Chalmers, *Hooded Americansim supra*, at 15.

While the Klan and other violent groups could not count the majority of the population as official

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finally root out segregation out of American life. See, e.g., *Turner v. City of Memphis*, 369 U.S. 350 (1962) (municipal airport restaurant); *New Orleans City Park Improvement Assn. v. Deliege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browner*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (golf courses) (1955); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (beaches) (1955).



members, it and other groups thrived because they enjoyed the tacit support of the community as a whole and of members of the political, business, and law enforcement establishment. See Glenn Feldman, *Politics, Society and the Klan in Alabama 1915-1949* 77-91 (1999). The Klan "successfully turned to more violence . . . where lawmen did not interfere and often joined and where judges and juries did not indict [or] convict." See Chalmers, *Backfire supra* at 40. Sheriffs within various Klan organized states did not arrest Klan members for crimes against Blacks, who in turn simply stopped reporting crimes. *Id.* at 44. Some of the poor Whites who joined the Klan stated that they only joined the organization "to avoid becoming its victim." Chalmers, *Hooded Americanism, supra* at 18.

Finally, the system of racial apartheid was maintained, not just by the violent suppression of blacks, and not just by the tacit accent of mainstream white society, but also by the suppression of any dissenting voices. In Alabama, after Klan candidates won the 1926 state government elections, Klan members used violence to silence whites who opposed the Klan agenda. Feldman, *supra*, at 84-92. When Clarence Darrow gave a speech in Mobile, Alabama, denouncing white supremacy and encouraging Blacks to resist racial suppression, the Klan circulated handbills depicting Darrow as an agitator and planned to tar and feather him. *Id.* at 96. When rumors of the Klan's plans to lynch Darrow circulated, detectives safely got Darrow onto a train out of town. *Id.* at 96-97.

In 1961, when freedom riders from the Congress of Racial Equality sought to desegregate public facilities by organizing bus rides throughout the south, they



were met with immediate violence. Chalmers, *Backfire, supra*, at 27-30. For example, when freedom riders arrived in Anniston, Alabama, a mob including members of the Ku Klux Klan, "pounded on the bus with clubs and pipes, smashed windows, [and] slashed tires." *Id.* at 30. They forced the passengers from the bus with a bomb and then brutally beat them. *Id.* A second group of freedom riders experienced the same brutal attacks in Birmingham Alabama. *Id.* at 30-31. A third group of freedom riders, including newsmen and President Kennedy's special representative, were beaten by angry mobs. *Id.* at 32. In 1964, the Klan, in Mississippi, beat, shot at, and jailed civil rights workers. *Id.* at 52. During that summer, Klan members were responsible for "eighty beatings, and the burning or bombing of at least sixty-five homes, churches, and other buildings," including the murder of at least eight people. *Id.*

**B. The social and political violence of Jim Crow society produced community mob-influenced trials in which race was an insurmountable impediment to due process**

The record of race-tainted trials that came out of Jim Crow society is much too long to be usefully catalogued here but the few examples we offer below are indeed emblematic of the phenomenon of jurors reflecting community prejudice rather than fairness.

*Browder v. Commonwealth*, 123 S.W. 328 (Ky. Ct. App. 1909), involved the trial and conviction of a black man accused of shooting and killing his white boss. The defendant, Browder, claimed self-defense, showing that he shot his boss only after his boss shot at him leaving a bullet lodged in Browder's back.

After Browder's arrest, two mobs stormed the jail; when they could not locate him they lynched four innocent black men. *Id.* at 330. The lynching resulted in a "midnight alarm" where the whites in the community, fearing backlash from the blacks, took up arms. *Id.* "Up to the trial the condition of public sentiment in the county was such that it was impossible to induce a member of the local bar to take part in the defense," yet the trial court denied Browder's motion for a change of venue. *Id.* at 331. The appellate court overruled the trial court's venue decision and stated, "race feeling was so excited that the defendant, who was the immediate occasion of the excitement, could not have a fair trial" in Russellville. *Id.* The court determined that "[w]hen the public mind is excited by race hostility the feeling may smolder, but, though not apparent on the surface, it does not soon die out, on the contrary often the sentiment spreads and strengthens." *Id.*

In *Moore v. Dempsey*, 261 U.S. 86 (1923), six black defendants appealed death sentences imposed for a murder allegedly committed in connection with the infamous race riot in Phillips County, Arkansas, in the fall of 1919. *Dempsey*, 261 at 87. An initial altercation in which whites shot into a black union meeting at a church and blacks returned the gunfire, killing a white man, quickly escalated into mayhem. *Id.* Marauding whites, some of whom flocked to Phillips County from adjoining states and enjoyed the assistance of federal troops ostensibly employed to quell the disturbance, went on a rampage against blacks, tracking them down through the rural county, and killing (on one estimate) as many as 250 of them.

*Id.*<sup>5</sup> Seventy-nine blacks (and no whites) were prosecuted as a result of the riot; twelve received the death penalty for murder; and six were involved in the appeal to the United States Supreme Court in *Moore v. Dempsey*. *Id.* at 101 n.2. The Court reversed their convictions on the ground that mob-dominated trial proceedings violated the Due Process Clause. *Id.* at 87.

In *Downer v. Dunaway*, 1 F. Supp. 1001 (D. Ga. 1932), the Georgia federal district court overturned the conviction and death sentence of a black man, John Downer, for rape of a white woman. Before Downer's arrest, the police arrested four other black men for the crime and a massive and hostile mob of 1,500 individuals surrounded the jail where the four suspects were incarcerated. *Id.* To prevent mob lynching, police officers rushed them away to a different county. *Id.* A day later, officers arrested the defendant and another suspect, and the mob once again mobilized and stood outside the jail. *Id.* at 1002. The governor called in National Guard troops and officers disguised the defendant in a national guard's uniform in order to transport him to a different county jail. *Id.* The defendant went on trial on the same day a grand jury indicted him. During the trial, the National Guard had to surround the courthouse to prevent the gathered mob from lynching the defendant. *Id.* The trial began at ten o'clock in the morning and the jury rendered its verdict and sentenced the defendant to death by ten o'clock that evening, after only five minutes of deliberation. *Id.*

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<sup>5</sup> See also Richard C. Cortner, *A Mob Intent on Death: The NAACP and the Arkansas Riot Cases* (1988).

In *Ex Parte Hollins*, 14 P.2d 243 (Okla. Crim. App. 1932), the appellate court reversed a conviction and death sentence of a black man convicted of rape. One day after the alleged rape, two mobs formed and attempted to lynch the defendant before trial. *Id.* at 245. On the same day that the defendant waived his right to a preliminary hearing, he appeared in district court and entered a guilty plea, and the judge sentenced him to death by electrocution, all without the presence of a defense attorney. *Id.* The trial judge "was afraid if the arraignment and sentence was delayed there might be a serious outbreak in Creek [C]ounty." *Id.* at 246. In finding that the defendant was not afforded due process of law, the appellate court reasoned that, while a defendant may voluntarily waive his right to a change of venue, the "defenseless Negro, with the terror of the mob in his mind, did not and could not voluntarily do anything, and therefore did not waive any of his constitutional rights." *Id.*

In *State v. Wilson*, 158 So. 621 (La. 1935), Wilson, a black man, appealed his murder conviction and death sentence by hanging for killing a white deputy sheriff. The deputy sheriff had attempted to arrest Wilson without a warrant. *Id.* at 622. A scuffle ensued, during which members of Wilson's family were shot, including Wilson himself, who sustained a gunshot wound to the thigh. *Id.* Officers arrested the entire Wilson family including, the children living in the Wilson home. *Id.* They charged one of Wilson's brothers and mother with principal charges and held the rest of the family as material witnesses. The night of Wilson's arrest, one of his brothers died in jail from a gunshot to the stomach, while the community attempted to lynch the rest of the family. *Id.* The trial judge scheduled the case for trial only

six days after the arraignment and denied a request for continuance from Wilson's attorneys, even though they had only four days, including the weekend, to prepare for trial; even though the extreme pain from Wilson's gun shot wound rendered him unable to assist his attorney's in preparing his defense; even though the jail physician found that Wilson could not walk or stand and would have to be carried into the courthouse; and even though on the day of the trial both Wilson and material witnesses remained in jail to escape a hostile mob of demonstrators. *Id.* The day after the case was submitted, the jury ruled Wilson guilty. *Id.*

*Powell v. Alabama*, 287 U.S. 45 (1936), was one of numerous state and federal decisions surrounding the infamous Scottsboro Boys incident. There, a group of young black men was accused, tried, and convicted in Alabama of raping two white women. The subsequent appeals raised a host of constitutional defects in the initials, including, among others, the fact that confessions had been coerced from some of the defendants and virtually all of them had been denied adequate counsel. But more relevant to the matter now before the Court is the description of the community sentiment at the time of the arrest and trial of the defendants. As this Court described the surrounding environment, a "sheriff's posse seized the defendants." *Powell*, 287 U.S. at 51. "Word of their coming and of their alleged assault had preceded them, and they were met at Scottsboro by a large crowd." *Id.* The "attitude of the community was one of great hostility," and "every step taken from the arrest and arraignment to the sentence was accompanied by the military." *Id.* In short, this Court reversed, noting that it was "perfectly apparent that the proceedings, from beginning to end, took

place in an atmosphere of tense, hostile, and excited public sentiment." *Id.* at 51.

In *Brown v. Mississippi*, 297 U.S. 278 (1936), three black men were tried and convicted of the murder of a White man. The main evidence at trial was the confessions of the defendants. But, as this Court recounted, the first defendant confessed after a deputy sheriff, accompanied by a community mob, hung him by a tree twice and subsequently whipped him until he confessed. *Id.* at 281. The remaining defendants confessed after they were stripped naked, laid over chairs and whipped with a leather strap with buckles on it until "their backs were cut to pieces." *Id.* at 282. The subsequent one-day trial of the Black defendants resulted in murder convictions, even though, "[t]he record of the testimony shows that the signs of the rope on [the] neck [of one of the defendants] were plainly visible..." *Id.* at 281.

In *Shepard v. Florida*, 341 U.S. 50 (1951), two black men were accused of raping a white woman. The circuit court found the men guilty of the crime. *Id.* at 50. This Court reversed, holding that the trial court erred in denying the defendants' motion for a change of venue. Among other facts, the Court found: newspapers in the community falsely reported that defendants had confessed to the crime; a mob gathered and demanded the officers to turnover the defendants to them; defendants had to be removed to state prison to prevent the mob from lynching them; the enraged mob burned down the home of one of the defendants' parents and homes of other black people in the community; blacks had to abandon their homes and flee from the community in order to prevent the mob from lynching them; and the National Guard had to be called in an attempt to restore peace.



*Shepard*, 341 U.S. at 51-53 (Jackson, J., concurring). Defendant's motion for a continuance, until the passion of the community had subsided, and a change of venue were denied. *Id.* at 53. In his concurring opinion, Justice Jackson wrote:

[T]his trial took place under conditions and was accompanied by events, which would deny defendants a fair trial before any kind of jury. I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. The only chance these Negroes had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required, would have brought.

*Id.* at 55.

In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the defendant, a black man, was convicted of murdering a white woman. The trial took place in Calcasieu Parish, Louisiana after law enforcement officials permitted a local television station to secretly film an interview with the defendant, in which he made incriminating statements after a night of interrogation. The interview was then repeatedly broadcast in the parish and surrounding communities and inflamed community sentiments to such an extent that this Court, in reserving Mr. Rideau's conviction, described the trial proceedings as a "kangaroo court." *Rideau*, 373 U.S. at 726.

While not every one of these cases was necessarily concerned with the constitutional standard for a change of venue in a criminal trial, together they, and others too numerous to discuss here, serve as a



historical proof of how, as in the case of petitioners' trial in Miami, Florida, the prejudices of the community and the passions of the moment can turn trials and juries into a threat to individual liberty.

### CONCLUSION

For the foregoing reasons and those set forth in the Petition, we pray the Court grant the petition for a writ of certiorari.

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**In The  
Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ,  
ANTONIO GUERRERO, GERARDO HERNANDEZ,  
AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

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**BRIEF OF AMICUS CURIAE FLORIDA  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS -  
MIAMI CHAPTER IN SUPPORT OF PETITIONERS**

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## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The Florida Association of Criminal Defense Lawyers ("FACDL") – Miami Chapter is a voluntary bar association consisting of more than 450 criminal defense lawyers who practice in Miami-Dade County, Florida. Its mission is to preserve the adversary system of justice and ensure fundamental fairness, due process, and equal protection for all persons accused of law violations. Among its purposes is to promote the efficient and fair administration of criminal justice and preserving the individual rights of the criminally accused through the improvement of the criminal law, its practices, and procedures. FACDL – Miami is an affiliate of Florida Association Criminal Defense Lawyers, Inc., a not-for-profit corporation with a membership of approximately 2000 criminal defense lawyers throughout Florida. FACDL is an affiliate of the National Association of Criminal Defense Lawyers, a similar organization comprised of some 12,000 members.

Amicus has a special interest in the decision under review because it directly affects the fair

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

administration of criminal and sentencing justice in our federal jurisdiction.

Amicus focuses on a narrow, but vital, aspect of the decision under review – the court's decision, despite significant error regarding one of petitioner Hernandez's concurrent sentences, *not* to remand his case for resentencing untainted by this error. The court's decision conflicts with caselaw of the Ninth Circuit Court of Appeals. It undermines this Court's recent sentencing opinions that recognize the necessity of district courts making correct calculations of the applicable Sentencing Guidelines. Ultimately, it leaves a known, erroneous, life sentence uncorrected for all times.

The Eleventh Circuit employed its no remand rule without any apparent assessment of the adverse consequences of an erroneous sentence generally, or the adverse consequences Hernandez may suffer specifically. The Eleventh Circuit's rule unreasonably shifts the risk of an erroneous sentence from the government to the improperly sentenced defendant.

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## ARGUMENT IN SUPPORT OF GRANTING THE WRIT

**This Court should grant review because the decision below refusing to remand for resentencing based on harmless error conflicts directly with caselaw of the Ninth Circuit Court of Appeals, unreasonably places the risk of future adverse consequences from this judicially determined erroneous sentence on the erroneously sentenced defendant, and ignores this Court's recent caselaw placing an imperative on correctly calculating a defendant's Sentencing Guidelines.**

In sentencing petitioner Hernandez and two of his co-defendants for conspiring to gather and transmit information related to national defense, the district court relied on a Guidelines provision that increases the applicable Guidelines range "if top secret information was gathered or transmitted." U.S.S.G. § 2M3.1(a)(1). Pet. App. 62a-63a, 70a. The district court applied this provision even though it did not find that top secret information was in fact gathered or transmitted; rather, it applied the provision because it concluded that the conspiracy with which the defendants were charged was at least intended to obtain such information. The district court therefore imposed a life sentence against these petitioners.

The Eleventh Circuit held that applying the provision under these circumstances was error because the provision "contemplates a completed event:

the actual gathering or transmission of top secret information" Pet. App. 62a-63a, and remanded the cases of Hernandez's two co-defendants for resentencing. But, the court declined to vacate and remand Hernandez's case for resentencing because he was sentenced to a concurrent sentence of life imprisonment on his conspiracy-to-murder charge. The court concluded that the error in the calculation of Hernandez's sentence for conspiracy to gather and transmit national-defense information was "irrelevant to the time he will serve in prison" and, thus, "harmless with respect to him." Pet. App. 70a. It drew this conclusion without analysis or consideration of any possible adverse consequences (besides time served in prison) of Hernandez's erroneous sentence.

As it acknowledged, the Eleventh Circuit's refusal to remand petitioner Hernandez's case for a simple resentencing hearing before the district judge conflicts with Ninth Circuit Court of Appeals caselaw. Pet. App. 71a. It conflicts with this Court's recent cases placing a greater imperative on proper sentence calculations. It also lets an erroneous sentence stand uncorrected.

Under the Ninth Circuit's decision in *United States v. Kincaid*, 898 F.2d 110 (9th Cir. 1990), a case of this type would be remanded. That circuit will remand an erroneous sentence notwithstanding that it runs concurrently with another, properly imposed sentence of at least the same length. *Kincaid* is correct in light of a criminal defendant's unquestionable right to appeal a sentence if that sentence "was

imposed as a result of an incorrect application of the sentencing guidelines.” 18 U.S.C. § 3742(a). This statutory right of appeal implies an obligation on the part of a court of appeals to correct an acknowledged error. And while *Kincaid* predated *United States v. Booker*, 543 U.S. 220 (2005), and this Court’s subsequent cases emphasizing the need for accurate sentencing calculations, these cases reinforce *Kincaid*’s insistence upon remand to correct the erroneous sentencing calculation.

In remanding the erroneous sentence in *Kincaid*, the Ninth Circuit explained that although a court may not be able to “identify a specific prejudice which may stem from [an] erroneous sentence,” it nevertheless must not “place upon [the defendant] the risk that such a prejudice will manifest itself in the future.” *Id.*, 898 F.2d at 112. This case offers a perfect example of the kind of prejudice that could arise. If this Court grants review and corrects petitioner Hernandez’s conviction on the murder conspiracy charge, his erroneous life sentence on the information-gathering charge will stand uncorrected and could lie outside of the mandate on remand. Hernandez will then be required to seek discretionary reconsideration of a sentence that had already been held to have been erroneously imposed. A similar result will obtain if Hernandez receives clemency on the murder conspiracy charge, a result made more likely here given the extraordinary international support for petitioners’ cause that has been expressed publically and directly to the federal government, Pet. App.

469a-490a, and which presumably will be reiterated in any clemency petition.

The potential for prejudice of this kind, along with others risks that are no less real for not being immediately foreseeable, easily outweighs the minuscule administrative costs of remanding for resentencing. See *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) (“[T]he cost of correcting a sentencing error is far less than the cost of a retrial. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel”). There is thus little reason to decline a remand, and every reason to require one.

The Eleventh Circuit attempted to garner support for its no remand rule from this Court’s opinion in *Williams v. United States*, 503 U.S. 193 (1992). Pet. App. 70a-71a. The court’s reliance on *Williams* was misplaced. *Williams* concerned whether a court of appeals must remand for resentencing if it is determined that the district court misapplied the Guidelines by considering an improper factor to support a departure sentence. It held that a remand is necessary unless the appellate court can determine that the error was harmless, i.e., that “the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.” *Id.* at 203. In the instant case, the fact that the district court had also imposed a second life sentence on a different charge is immaterial to whether it would have imposed the same sentence on the challenged count. As

to that sentence, the district court had indeed erred in calculating the Guidelines, an error that resulted in an erroneous life sentence.

On the other hand, several of this Court's older cases indicate a limited vitality and application of the "concurrent sentence doctrine." In *Benton v. Maryland*, 395 U.S. 784 (1969), this Court surveyed its cases applying this doctrine to refuse to consider challenges to convictions when there was a conviction on a separate charge carrying a concurrent sentence of equal or greater length to the sentence on the challenged count. Despite sweeping statements in some of these cases suggesting that this doctrine constituted a jurisdictional bar, the Court held that it was not. *Id.* at 789. The Court cited *Sibron v. New York*, 392 U.S. 40 (1968), which held that a challenge to a conviction for which the sentence was expired was not moot. This Court there noted that even the "mere possibility" of adverse collateral consequences from a challenged conviction sufficed to require review. *Id.* at 54-5. In *Benton* this Court noted that even the "remote . . . possibility" of a collateral consequence, like a conviction being used in some future prosecution to enhance a sentence, "was enough to give this case an adversary cast" and prevent application of the doctrine. *Id.* at 790-1. The Court left open the question whether the "concurrent sentence doctrine" has any "continuing validity as a rule of judicial convenience." *Id.*

This Court's most recent sentencing decisions support a rule requiring remand for resentencing

where an erroneous sentence has been imposed. Although they establish that the decision of what sentence is appropriate in a given case is left to the discretion of the district judge, *see Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 127 S. Ct. 2456 (2006), they concomitantly require the sentencing court to correctly calculate the sentence recommended by the Guidelines. *See, e.g., Gall* at 596 (“a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range”). Additionally, because this Court’s cases have limited the appellate courts’ role in determining whether a particular sentence is substantively reasonable, appellate courts must closely police the procedures that district courts use in imposing sentence. *See, e.g., In re Sealed Case*, 527 F.3d 188, 191 (D.C. Cir. 2008) (“Given the broad substantive discretion afforded to district courts in sentencing, there are concomitant procedural requirements they must follow”); *United States v. Cavera*, 550 F.3d 180, 189-90 (2d Cir. 2008) (en banc) (“This degree of deference is only warranted, however, once we are satisfied that the district court complied with the Sentencing Reform Act’s procedural requirements, and this requires that we be confident that the sentence resulted from the district court’s considered judgment as to what was necessary to address the various, often conflicting, purposes of sentencing”). Under these cases, a district court should be given a second opportunity to consider what sentence is appropriate



upon a legally correct application of the Sentencing Guidelines.

The Eleventh Circuit's approach here, which is also taken by five other circuits,<sup>2</sup> stands in contrast to the approach taken in *Kincaid*, as the court of appeals itself acknowledged. See Pet. App. 71a (citing *Kincaid*). The Eleventh Circuit's rule is unfair and incorrect. It wrongly deprived Hernandez of an effective appeal of his sentence on the conspiracy count. It unjustly placed the risk of all future adverse consequences of the erroneous sentence on Hernandez. It ignored this Court's admonitions as to the importance of proper sentencing calculations and procedure. It also deprived the district court of an opportunity to impose sentence according to a correct view of the law – an opportunity of heightened importance because the district court had imposed a life sentence against Hernandez under a mandatory sentencing regime that *Booker* held unconstitutional.

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<sup>2</sup> See, e.g., *United States v. Pierre*, 484 F.3d 75, 90-1 (1st Cir. 2007); *United States v. Rivera*, 282 F.3d 74, 77-8 (2d Cir. 2000); *United States v. Pardo*, 25 F.3d 1187, 1194 (3d Cir. 1994); *United States v. Olunloyo*, 10 F.3d 578, 582-3 (8th Cir. 1993); *United States v. Segien*, 114 F.3d 1014, 1021 (10th Cir. 1997).



## CONCLUSION

For all these reasons, this Court should grant the petition in order to resolve the split between the circuits and to correct the Eleventh Circuit's error.

Respectfully submitted,

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*Petitioners,*

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On Petition for a Writ of Certiorari  
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**BRIEF OF THE IBERO-AMERICAN FEDERATION  
OF OMBUDSMAN; THE ORDER OF ATTORNEYS OF  
BRAZIL; THE BELGIUM BAR ASSOCIATIONS; THE  
BERLIN BAR ASSOCIATION; THE COMMITTEE  
FOR HUMAN RIGHTS OF THE PORTUGUESE BAR  
ASSOCIATION; THE INTERNATIONAL  
FEDERATION FOR HUMAN RIGHTS; FEDERICO  
MAYOR ZARAGOZA (DIRECTOR-GENERAL OF  
UNESCO, 1987-1999); JUDGE JUAN GUZMÁN TAPIA  
OF CHILE; AND HUMAN RIGHTS, RELIGIOUS AND  
LEGAL ORGANIZATIONS, LAW PROFESSORS AND  
LAWYERS FROM ARGENTINA, CHILE, COLUMBIA,  
ECUADOR, GERMANY, JAPAN, MEXICO, PANAMA,  
PORTUGAL, SPAIN AND UNITED KINGDOM AS  
AMICUS CURIAE IN SUPPORT OF THE PETITION  
FOR WRIT OF CERTIORARI**

**AMICUS CURIAE**

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## MISCELLANEOUS

- Human Rights Watch, Americas Human Rights  
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- M. Chesterman, J. Chan & S. Hampton, *Managing  
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criminal jury trials in New South Wales*, Law  
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- United States Dept. of State, Bureau of  
Democracy, Human Rights, and Labor, 2007  
*Country Reports on Human Rights Practices*,  
available at [http://www.state.gov/g/drl/rls/  
hrrpt/2007/](http://www.state.gov/g/drl/rls/hrrpt/2007/) ..... 14
- United States Dept. of State, Bureau of  
Democracy, Human Rights, and Labor,  
*Country Reports on Human Rights Practices*,  
Intro., available at [http://www.state.gov/g/  
drl/rls/hrrpt/2001/8147.htm](http://www.state.gov/g/drl/rls/hrrpt/2001/8147.htm) ..... 14

## INTEREST OF THE AMICI CURIAE<sup>1</sup>

The Amici are a diverse array of foreign bar associations, foreign government officials whose legal duty is the protection of human rights, foreign lawyers and law professors, the former Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO), a prominent former Chilean judge, and foreign human rights, non-governmental, religious and legal organizations. They are deeply disturbed about the violation of petitioners internationally guaranteed right to a fair trial due to Miami's climate of pervasive community hostility, prejudice, unfavorable publicity and violence against agents or perceived sympathizers of the government of Cuba. Amici view petitioners' trial and conviction as contradicting the United States' international commitment to accord all defendants a fair trial before an impartial tribunal. Amici's interest in this case stems from and is reflective of the intense public interest, discussion and dialogue that petitioners' trial and conviction in Miami has engendered in their countries.

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<sup>1</sup> This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. This brief was prepared by counsel for amici with the extremely helpful assistance of University of Pittsburgh Law School students Amanda Fisher and Elizabeth Tuccillo.



## **IBERO-AMERICAN FEDERATION OF OMBUDSMAN**

The Ibero-American Federation of Ombudsman (FIO) represents 86 national, state, autonomous and provincial government officers serving as Ombudsmen, Public Defenders, Commissioners, and Presidents of Public Human Rights Commissions from Spain, Andorra, Argentina, Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal and Venezuela. Their official duty, imposed by law, is the protection of the human rights of citizens against government abuse. On March 27, 2008, the Governing Council of FIO approved a resolution that recommended the United States' full compliance with opinion No. 19/2005 of the Work Group of Arbitrary Detentions of the United Nations with respect to the petitioners in this case, and requested a fair and expeditious new trial based on the U.S. Constitution and international law for the five petitioners. The Governing Council of FIO considered this situation to present a special case where FIO felt it had a strong moral and ethical duty to speak out about this important human rights violation despite the fact that neither the United States nor Cuba are parties to FIO.

## **THE ORDER OF ATTORNEYS OF BRAZIL**

The OAB was founded in 1930 and is the Brazilian Bar Association, with almost 700,000 lawyer members. Membership in OAB is required in order to practice law in Brazil. OAB is responsible by law for the regulation of the legal profession in Brazil. One of

its guiding principles is the right articulated in Article 10 of the Universal Declaration of Human Rights that "every person has the equal right to a fair and public trial, by an independent and impartial court, which shall decide about their rights and duties or about any criminal accusation against them," a right it believes was violated in petitioners' case.

### BELGIUM BAR ASSOCIATIONS

The Flemish Bar Association (Orde van Vlaamse Balies O.V.B.) is a Belgium Bar association composed of more than 8,600 Dutch-speaking lawyers. The Bar Association for French and German Speakers (Ordre des barreaux francophones et germanophones, O.B.F.G.) is a Belgium Bar association composed of approximately 7,000 French and German-speaking lawyers. Membership in either the O.V.B. or the O.B.F.G. is required by law for all attorneys practicing in Belgium.

### GERMANY

The German amici include the Berlin Bar Association (Rechtsanwaltskammer Berlin), which is composed of over 12,000 members; the League of Human Rights and the Defense Bar Association (die internationale Liga für Menschenrechte, Berlin); the Association of Republican Lawyers (RAV) (der Republikanische Anwältinnen und Anwälteverein); and the Working Group law students at the Universidad Humboldt in Berlin (akj) (der Arbeitskreis kritischer Juristinnen und Juristen an der Humboldt universität).

## PORTUGUAL

The Committee for Human Rights of the Portuguese Bar Association (Comissão dos Direitos Humanos, Ordem dos Advogados) and the Committee's President, José Augusto Rocha are amici. The Portuguese Bar Association (Ordem dos Advogados Portugueses) is responsible for regulation of the legal profession and was established by law in 1926.

## INTERNATIONAL FEDERATION FOR HUMAN RIGHTS

Established in 1922, the International Federation for Human Rights (FIDH) is a federation of 155 non-profit human rights organizations in more than 100 countries. FIDH has consultative status before the United Nations, UNESCO and the Council of Europe. FIDH coordinates and supports its affiliates' activities at the local, regional and international level, to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators, in accordance with international standards on due process and the right to a fair trial. With activities ranging from judicial enquiry, trial observation, research, advocacy, and litigation, FIDH seeks to ensure that all international human rights and humanitarian law instruments are respected by State parties. FIDH has initiated and supported proceedings before domestic courts and regional and international bodies in cases concerning arbitrary detention, torture, and other abusive practices.

## **FEDERICO MAYOR ZARAGOZA**

Federico Mayor Zaragoza was the Director-General of United Nations Educational, Scientific and Cultural Organization (UNESCO) from 1987 to 1999 and Minister of Spain from 1981 to 1982.

## **JUDGE JUAN GUZMÁN TAPIA**

Judge Juan Guzmán Tapia is a prominent and respected Chilean jurist who served on Chile's Court of Appeals for 22 years. He was appointed to investigate and then try former Chilean dictator Augusto Pinochet on human rights charges, and investigated a total of 99 cases of human rights violations. He is the former Dean of the law school at the Central University of Chile (Universidad Central de Chile) and is currently the director of its Center for the Study of Human Rights and also a Professor of Law at the Catholic University of Chile, and the Santiago Police Academy. He has received numerous awards within Chile and abroad; received honorary doctorates from the Catholic University of Leuven, Belgium, from the Monterrey Institute of International Studies, California, and from Oberlin College, Ohio. He has authored numerous books on law that have been published in various countries and is a member of the Royal Academy of Financial Sciences of Barcelona, Spain. Judge Guzmán joins as amicus particularly because he believes that the United States, a country that has traditionally been an example of democracy and justice, must return to that course and ensure that rights are respected and continue to serve as an example for other nations.

## LATIN AMERICAN COUNCIL OF CHURCHES

The Latin-American Council of Churches (Consejo Latinoamericano de Iglesias) is an organization of churches and Christian movements from 21 countries in Latin America and the Caribbean. It is composed of more than 150 churches of different denominations, including Episcopalian, Lutheran, Baptist, Methodist, Presbyterian, Mennonite and Pentecostal churches and was founded in 1982.

## ECUADOR

The Permanent Human Rights Assembly—APDH of Ecuador (Asamblea Permanente de Derechos Humanos—APDH del Ecuador) is a not-for-profit, non-governmental organization for the defense, education and promotion of human rights. It is concerned that petitioners' trials violated Article 14 of the International Covenant on Civil and Political Rights.

## JAPAN

The Japanese amici, lawyers, law professors and legal organizations dedicated to promoting human rights and social justice, believe that this case presents violations of both the constitutional right to a fair trial in the United States, and the corresponding rights contained in Article 14 of the International Covenant on Civil and Political Rights. The Japanese amici are composed of two legal and human rights organizations, 46 lawyers and three law professors. The Japanese amici believe that the United States generally respects fundamental human rights, has provided an example

of the rule of law to the rest of the world, and urges other nations of the world to respect human rights. They have a deeply held belief in the fairness of the U.S. judiciary, and therefore fail to understand how United States courts can consider the petitioners' trial to comport with the requirements of a fair trial and impartial tribunal. In their view, the integrity of the U.S. judiciary will be verified if the United States Supreme Court overturns the Court of Appeals decision and uses this case to demonstrate that constitutional values and human rights are not to be neglected on grounds of the political affiliations of the defendants.

### UNITED KINGDOM

United Kingdom amici include 14 professors of law, including professors from Oxford, the London School of Economics and King's College, and 18 barristers and solicitors.

### CHILE

The Chilean amici besides Judge Guzmán are the National Group of Former Political Prisoners of Chile (Agrupación Nacional de Ex Presos Políticos de Chile), composed of 25 organizations throughout Chile, and the Group of Family Members of Executed Political Figures (Agrupación de Familiares de Ejecutados Políticos de Chile).

### SPAIN

The Spanish amici besides Federico Mayor Zaragoza are composed of nine legal and human rights



organizations, one bar association, six professors of law and 98 attorneys. In Spain, as in many other countries, petitioners' case has raised intense public interest, even creating social alarm in wide strata, especially among the law professionals and human rights defenders. Since the trial of the petitioners, many activities have taken place in Spain expressing concern about the case. In the last few years, there have been numerous activities, conferences and debates in Spain that many of the Spanish amici have participated in concerning the lack of conformity of petitioners' trial with international human rights norms.

## COLUMBIA

The Collective Corporation of Lawyers José Alvear Restrepo (Corporación Colectivo de Abogados José Alvear Restrepo) is a Columbian non-governmental human rights organization with consultative status to the Organization of American States. It is composed of attorneys who defend and promote human rights. The organization has received several international awards including an award for its work from the Republic of France given to them by then President Chirac in 1996. It has successfully brought cases before the Inter-American Court of Human Rights and the Working Group on Arbitrary Detention of the United Nations. In 2003, the organization's president won the Martín Ennals Human Rights Award.



The Columbian amici also includes Professor Renán Vega Cantor, Doctor in Political Studies and Professor at the National Teaching University.

## PANAMA

The Panamanian amici are organizations and prominent lawyers that are committed to promoting the defense and respect of human rights and of fundamental judicial and political guarantees, both in Panama and abroad. Those organizations include: the Ecumenical Committee of Panama (Comité Ecuménico de Panamá) (CEOPA), whose membership consists of major denominations such as the Catholic Church, the Greek Orthodox Church, the Russian Orthodox Church, the Anglican Church, the Evangelical Methodist Church of Panama, the Methodist Church of the Caribbean and the Americas, the Baptist Calvary Church, the Union Church, the Lutheran Church and the Salvation Army of Panama; the Coordinator of Human Rights of People Panama (Coordinadora Popular de Derechos Humanos de Panamá) (CHRPP), which is made up of a variety of organizations and Panamanian unions with thousands of members; Association of Litigant Lawyers of Panama (Asociación de Abogados Litigantes de Panamá); the Association of Independent Lawyers of Panama (FRAI) (Frente de Abogados Independientes de Panamá), composed of approximately four hundred and twenty Panamanian lawyers; the Istmeña Academy of International Law (Academia Istmeña de Derecho Internacional); the Latin American Academy of International Law (Academia Latinoamericana de Derecho

Internacional); Columbian-Panamanian Institute of Procedural Law (Instituto Colombo Panameño de Derecho Procesal); the Peace and Justice Service in Panama (Servicio Paz y Justicia en Panamá), which has consultative status before official United Nations bodies; Alternative Legal Assistance of Panama (Asistencia Legal Alternativa de Panamá); the Social Training Center of Panama (Centro de Capacitación Social de Panamá), which has consultative status at the United Nations; the National Indigenous Lawyers Union of Panama (Unión Nacional de Abogados Indígenas de Panamá), a non-profit legal organization, whose guiding principles include respect for the guarantees of due process; Center for Social Training of Panama (Centro de Capacitación Social de Panamá).

In addition three prominent Panamanian lawyers join as amici: Dr. Hernando Franco Muñoz, the former legal advisor of the President of the National Assembly of Panama as well as the Assembly's international relations legal advisor and currently Director of the Department of Public Law, Department of Law and Political Science at the University of Panama; Lic. Ramiro Guerra Morales, a Member of the Board of Directors of the National College of Attorneys, Panama; and Lic. Carlos Ayala Montero, the Advisor to the National Assembly's Commission on Work and Social Welfare and Executive Director of the Panamanian Academy of Labor Law.

## MEXICO

The Human Rights Program at the UACM, dedicated to teaching, research, training, and advocacy specialized in international human rights issues, is one of only three such programs at the Master's level in Mexico. The UACM is Mexico's largest urban public university. The program's advocacy activities include participation as counsel in human rights cases in the Mexican courts and in the context of the UN and Inter-American Human Rights systems. Enrique González Ruiz is the program's current coordinator and former Rector (President) of the Autonomous University of Guerrero. Camilo Pérez Bustillo (J.D., Northeastern University Law School, 1981) is a Research Professor in the same Program and former holder of the endowed W. Haywood Burns Memorial Chair in Civil Rights Law at the City University of New York (CUNY) Law School.

## ARGENTINA

The Argentina amici include the Argentinean League for the Rights of Man founded in 1937 (Liga Argentina por los Derechos del Hombre); Argentinean League for the Rights of Man Rosario (Liga Argentina por los Derechos del Hombre Rosario); Family Members of Those Who Have Disappeared or Been Detained for Political Reasons Rosario (Familiares de Desaparecidos y Detenidos por Razones Políticas Rosario); Center of Study and Investigation of Human Rights (Centro de Estudio e Investigación en Derechos Humanos); Permanent Assembly for Human Rights

Rosario (Asamblea Permanente por los Derechos Humanos Rosario).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' trial took place in an extraordinary climate of violence, intimidation, pervasive community prejudice, and publicity in Miami directed against the Cuban government, its agents, and anyone perceived to be sympathizers. This "climate of bias and prejudice against the accused" led the United Nations Human Rights Commission for the first time in its history to condemn an American judicial proceeding, stating that, "the trial did not take place in the climate of objectivity and impartiality that is required to conform to the standards of a fair trial as defined in Article 14 of the International Covenant on Civil and Political Rights." Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add. 1, at 65 (Oct. 19, 2005). Numerous human rights, non-governmental and legal organizations throughout the world concur in the Human Rights Commission's assessment. The en banc Court of Appeals erred in virtually ignoring this extensive factual record of community bias and prejudice against the Castro government and its agents or perceived sympathizers in Miami.

The right to a fair and "impartial" tribunal, free from outside influences, is a fundamental principle of all democratic societies and of international law. Strict adherence to this principle is particularly significant in this case in light of the important role that the United States plays in promoting this right throughout the world. Numerous State Department

human rights reports criticize other nations for their failure to adhere to the principle that tribunals shall operate "impartially," "without improper influence" and free from "political and other extraneous considerations." See, e.g., United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *2007 Country Reports on Human Rights Practices*, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/> (see specifically reports on Timor-Leste, Burma, Tunisia, Croatia, Malaysia, Syria, Iran), United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices*, Intro., available at <http://www.state.gov/g/drl/rls/hrrpt/2001/8147.htm>. Friendly nations and civic organizations view the U.S. with expectations based on widely accepted international law and a shared commitment to a democratic legal tradition. Unfriendly countries look for an opportunity to accuse the United States of violating minimal standards of international law or to seize upon an American precedent to justify their own violations.

Petitioners' case has received substantial international attention and concern regarding the perceived conflict between the United States' commitment to human rights and its failure to accord nationals of a country with which it has had substantial political tensions the fundamental guarantees of a fair trial and impartial tribunal. As the United States government pointed out in *Brown v. Board of Education*:

The United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

Brief for the United States Government as Amicus Curiae, at 6 in *Brown v. Board of Education*, 347 U.S. 483 (1954).

It is this Court's responsibility to ensure that the right to a fair and impartial trial that the United States cherishes at home and promotes abroad is applied equally to citizens and aliens of all races, creeds and political views, especially in those cases which arouse the strong political and emotional passions which historically have presented the gravest threat to the impartial administration of justice. The intense international interest, concern and criticism that petitioners' trial engendered affords this Court the opportunity to affirm this nation's commitment and adherence to that universally recognized fundamental principle.



## ARGUMENT

### I. THE PETITIONERS' TRIAL DID NOT COMPORT WITH INTERNATIONAL STANDARDS OF A FAIR TRIAL BY AN IMPARTIAL TRIBUNAL

The right to a fair and impartial tribunal, free from outside influences, is a fundamental right recognized by United States and International Law. Article 14(1) of the International Covenant on Civil and Political Rights imposes on all member States, including the United States, the duty to provide all persons facing criminal charges "[. . .] a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights art. 14(1), Oct. 5, 1977, 999 U.N.T.S. 171. Regional systems of international human rights law put forth the same guarantee, including the European Covenant on Human Rights, which states in Article 6(1) that "In the determination of . . . any criminal charge against him, everyone is entitled to a . . . hearing . . . by an independent and impartial tribunal . . ."; and Article 8(1) of the American Convention on Human Rights, which states that "Every person has the right to a hearing [. . .] by a competent, independent, and impartial tribunal [. . .]." American Convention on Human Rights art. 8(1), June 1, 1977, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 6(1), Sept. 3, 1953, 213 U.N.T.S. 221. *See also* Universal Declaration of Human Rights art. 10, G.A. Res. 217A

(III), U.N. Doc. A/810 (Dec. 10, 1948) ("every person has an equal right to a fair and public trial, by an independent and impartial court").

The European Court of Human Rights (ECHR) views the fundamental importance of the right to an impartial tribunal as instilling the confidence that courts in a democratic society must inspire in the public. *Wettstein v. Switzerland*, 2000-XII Eur. Ct. H.R. 695. The Inter-American Court of Human Rights (IACtHR) has echoed this position, describing the right to be tried by an impartial tribunal as a fundamental guarantee of due process, which inspires the necessary trust and confidence in the parties to the case, and to the citizens of a democratic society. *Herrera-Ulloa v. Costa Rica*, Case 12,367, Int-Am. C.H.R., Series C No. 107 (2004). Courts of democratic foreign nations have stated that the public confidence in the legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice, and must appear to all reasonable observers as fair to those of every race, religion, nationality, ethnic origin and political viewpoint. *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (Can.). As the widespread international condemnation of petitioners' trial demonstrates, that confidence and trust has clearly been undermined in this case.

Both the Inter-American Court of Human Rights and the European Court of Human Rights, have held that a Tribunal's "impartiality" entails both objective and subjective aspects.

First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. *In this respect even appearances may be of certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings.*

Inter-American Court of Human Rights, Case of *Herrera-Ulloa v. Costa Rica*, para. 170-171 (2004) (emphasis added) (citing *Pabla Ky v. Finland*, [2004] Eur. Ct. H.R. 279, ¶ 27, Judgment of June 26, 2004, para. 27; Eur. Ct. H.R. *Morris v. United Kingdom*, [2002] Eur. Ct. H.R. 162, ¶ 58, Judgment of Feb. 26, 2002, para. 58).

"What is decisive is whether his [the accused's] doubts can be held to be objectively justified." *Sahiner v. Turkey*, [2001] Eur. Ct. H.R. 552, ¶ 44. A violation of Article 6(1) occurs where the tribunal "did not present the necessary appearance of impartiality." *Kingsley v. United Kingdom*, [2002] Eur. Ct. H.R. 468, ¶¶ 32, 34. The tribunal must "exclude any legitimate doubt in respect to its impartiality," or any appearance of bias to ensure that "justice must not only be done, it must also be seen to be done." *Micallef v. Malta*,

[2008] Eur. Ct. H.R. 41, ¶¶ 71, 75. The objective test for impartiality is not met where safeguards are "insufficient to exclude the risk of outside pressures being brought to bear on the tribunals members." *Morris v. United Kingdom*, *supra* (2002) ¶ 72.

Here, neither the subjective nor the objective tests for impartiality were met. For example, the jury foreperson was clearly subjectively biased against the Cuban government. *United States v. Campa*, 419 F.3d 1219, 1235 n.73 (11th Cir. 2005). More importantly, under the objective test, quite apart from the juror's or judge's personal conduct and beliefs, there were objective "ascertainable facts which may raise doubts as to [the jurors] impartiality." Case of *Herrena-Ulloa*, para. 170-71 (2004); *Morris v. U.K. Judgment*, *supra*. Nonetheless, in disregard of the international standard articulated by the Inter-American and European Courts of Human Rights and the UN Human Rights Committee, the Eleventh Circuit Court of Appeals inappropriately ignored and categorically dismissed the extensive objective facts of pervasive bias against perceived agents or sympathizers in the Miami community.

As the panel of the Court of Appeals unanimously found and the petition sets forth, the climate in Miami included: scores of bomb threats and actual bombings against persons and institutions perceived supportive of the Cuban government during the decade before the trial; pervasive publicity both before and during the trial generating an atmosphere of great hostility toward any person associated with

the Castro government, including news articles relating directly to the charged crimes and the defendants; the very numerous, passionate and vocal Cuban American exile community living in Miami that considered Cuban-related matters "hot-button issues"; demonstrations, press conferences with victims' families, commemorative flights in honor of the deceased pilots, televised media filming of the jurors entering and leaving the courthouse during the trial; and an overall community environment in which, according to a survey by Professor Gary Moran approximately 70% of all respondents in Miami were prejudiced against the defendants.

These circumstances created an atmosphere of intimidation and bias in which a number of potential jurors admitted to fearing for their own safety or their employment, some of the jurors eventually empanelled indicated that they felt pressured, and three jurors expressed negative beliefs regarding Castro or the Cuban government but believed that they could nevertheless ignore their beliefs while on the jury. For example, during voir dire, one venire member stated that he would "feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban community feels, how they think the verdict should be." *United States v. Campa*, 419 F.3d *supra*, at 1234. He went on to state that he "would probably be a nervous wreck, if you want to know the honest truth. I could try to be as objective as possible and be as open minded as possible, but I would have some trouble dealing with the case." *Id.* Another indicated

that he was concerned about his future ability to do his job as a banker "because he dealt with a lot of developers in the Hispanic community and knew the case was high profile enough that there may be strong opinions which could affect his ability to generate loans." *Id.* During the trial and deliberations, members of the jury were on various occasions filmed entering and leaving the courthouse, footage that was aired on television. *Id.* at 1252. Jurors expressed concern that they were filmed all the way to their cars and "that their license plates had been filmed." *Id.* These undisputed facts were simply disregarded as irrelevant by the en banc Court of Appeals.

The jurors' fears were objectively justified. Reports by news media and human rights organizations document the extensive history of violence and intimidation that has created a climate in Miami on matters involving Cuba in which "only a narrow range of speech is acceptable and views that go beyond those boundaries may be dangerous." Human Rights Watch, Americas Human Rights Watch Free Expression Project Report, *Dangerous Dialogue Revisited: Threats to Freedom of Expression Continue in Miami's Cuban Exile Community* (1994); Jim Mullin, *The Burden of a Violent History*, Miami New Times, Apr. 20, 2002, cited in *United States v. Campa*, 419 F.3d *supra*, at 1255.

The European Court has required particularly heightened scrutiny to ensure the appearance of an impartial and independent tribunal where a trial involves a member of a political group that has been in



bitter or violent confrontation with other groups in society. In reviewing the conviction of a defendant sentenced to life imprisonment for instigating deadly terrorist acts in Turkey, the Court held that the original make up of the court improperly included a Turkish military judge, even though by the time the judgment was rendered this judge had been replaced by a civilian judge and there was no evidence that the military judge himself was improperly biased. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 282. The Court noted that because of the national security issues involved, and the conflict between the defendant's organization and the military, the defendant could have a legitimate fear that the Turkish Court "might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case." *Id.* at ¶ 113. The ECHR held that this was a violation of Article 6, despite the replacement of the military judge prior to the final verdict. Similarly, in *AB Kurt Kellerman v. Sweden*, [2004] Eur. Ct. H.R. 546, ¶ 63 the Court stated that impartiality could be threatened if members of the Court had a common interest contrary to those of the applicant, or if their interests, although not common, were such that they were nevertheless opposed to those of the applicant.

The courts of other nations have also recognized the potential threat to justice posed by pervasive community bias or detrimental publicity irrespective of whether the publicity or bias subjectively affects particular jurors, and have imposed unusual or extraordinary means when faced with such threats to a jury's impartiality. For example, the Canadian



Supreme Court has repeatedly recognized, in contrast to the Court of Appeals' decision in this case, that where there is demonstrable, widespread prejudice in a community that is likely to result in "aberrant juror behavior" despite instructions from the Judge to act impartially, special measures are called for even if there is "no concrete evidence" that any of the individual jurors could not set aside their biases. *Her Majesty the Queen v. Sean Spence* [2005] SCC 72 (Can.); *Williams v. R* [1998] 6 BHRC 189 (Can.). As the Canadian Court has noted, where widespread bias is demonstrated, "we should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of the jurors." *Spence*, at ¶ 36. Indeed, while the Eleventh Circuit here categorically rejected evidence of prejudice that did "not relate directly to the defendants' guilt for the crime charged," the Canadian Court recognized that the potential for partiality can be shown even in the absence of prejudice linked to the specific defendants. *Williams v. R*, ¶ 27. As one international study has noted, generic prejudice can occur by "media coverage that does not specifically relate to a defendants case, but is of such pervasiveness that it paints a defendant with an incriminating and indelible brush." M. Chesterman, J. Chan & S. Hampton, *Managing prejudicial publicity: an empirical study of criminal jury trials in New South Wales*, Law and Justice Foundation of NSW (2000).

It is precisely such objective, "generic prejudice" that the Eleventh Circuit categorically rejected. While

foreign courts may have differing specific approaches to preventing bias from affecting an impartial tribunal, they recognize the problem of pervasive community prejudice or publicity that the Court of Appeals in this case studiously ignored. A trial in the Miami venue was manifestly unfair.

The conflict between the United States' commitment to promote human rights abroad as well as to set an example for other nations, and the view of many informed international observers that petitioners were not tried before an impartial tribunal, can only undermine the confidence and trust the international community has in the United States judiciary. For significant sectors of international society, this case tests both the appearance and reality of the American judiciary's impartiality that is so important to maintaining societal confidence in an independent judiciary. This Court should grant the petition to affirm and restore international confidence in the United States' commitment to fair trials before an impartial tribunal.

## **II. HERNANDEZ'S CONVICTION FOR CONSPIRACY TO MURDER ILLUSTRATES THE EFFECT THE PERVASIVE COMMUNITY BIAS HAD ON PETITIONERS' TRIAL**

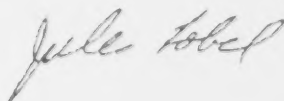
As the UN Human Rights Commission pointed out, the confluence of both the climate of bias and prejudice against the accused in Miami and "the nature of the charges and the harsh sentences handed down to the accused," lead to the conclusion that the trial was neither impartial nor conformed to the

standards of a fair trial. Report of the United Nations Working Group on Arbitrary Detentions, *supra* at ¶ 29. That Petitioner Hernandez was convicted of conspiracy to murder and received a life sentence when there was virtually no evidence that he had conspired with the Cuban government to intentionally shoot down airplanes *in international airspace* simply confirms that "it is inconceivable that petitioner . . . received an impartial assessment of his guilt or innocence on the basis of the evidence." *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985). That a highly political trial took place in such a highly politicized venue and resulted in a verdict against Hernandez on conspiracy to murder that is unsupported by substantial evidence, supports the view of many informed international observers that politics, not facts, played the decisive role in the trial.

### CONCLUSION

For the aforementioned reasons, Amici urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jules Lobel".

Jules Lobel

## APPENDIX

## **APPENDIX—LIST OF AMICI**

**Ibero-American Federation of Ombudsman**  
(Federación Iberoamericana del  
Ombudsman)

**Order of Attorneys of Brazil (Ordem dos**  
**Advogados do Brasil)**

**Belgium—The Belgium Bar Associations:**  
Flemish Bar Association (Orde van Vlaamse  
Balies); Bar Association for French and  
German Speakers (Ordre des barreaux  
francophones et germanophones)

**Germany:** Berlin Bar Association  
(Rechtsanwaltskammer Berlin); League of  
Human Rights and the Defense Bar  
Association (die internationale Liga für  
Menschenrechte, Berlin); Association of  
Republican Lawyers (RAV) (der  
Republikanische Anwältinnen und  
Anwälteverein); the Working Group law  
students at the Universidad Humboldt in  
Berlin (akj) (der Arbeitskreis kritischer  
Juristinnen und Juristen an der Humboldt  
universität)

**Portugal:** Committee for Human Rights of the  
Portuguese Bar Association (Comissão dos  
Direitos Humanos, Ordem dos Advogados) and  
the Committee's President, José Augusto  
Rocha

**International Federation for Human Rights  
(Fédération internationale des droits de  
l'homme)**

**Latin American Council of Churches**

**Ecuador:** Permanent Assembly of Human Rights—APDH of Ecuador (Asamblea Permanente de Derechos Humanos—APDH del Ecuador)

**Japan:** Foundation of Human Rights in Asia;  
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Hiroshi Yasui; Takashi Yatabe

**United Kingdom:** 14 professors of law and 18 barristers and solicitors: **Professors of Law:** Benjamin Bowling (Professor of Criminology, School of Law, King's College London); Bill Bowring, Barrister (Professor of Law, School of Law—Birkbeck College, University of London); Christine Chinkin (Professor of International Law, London School of Economics); Emiliios Christodoulidis (Professor of Law, Glasgow University); Professor Aileen McColgan (Professor of Human Rights Law, King's College London); Keith Ewing (Professor of Public Law, University College, London); Conor Gearty (Professor of Human Rights Law, London School of Economics); Guy S. Goodwin-Gill (Professor of International Refugee Law, University of Oxford); Alan W. Norrie (Professor of Criminal Law and Criminal Justice, School of Law, King's College, London); Javaid Rehman (Professor of Law and Advocate, Brunel Law School, Brunel University); Dr. Phil Scruton (Professor, School of Law, Queen's University, Belfast); Adam Tomkins (Professor of Public Law, School of Law, University of Glasgow); Thomas Scott Veitch (Professor of Public Law, School of Law, University of Glasgow); Stuart Weir (University of Essex); **Barristers and Solicitors:** Baroness Helena Kennedy Q.C. (Member of the House of Lords and Chair of



Justice—the British arm of the International Commission of Jurists; member of the governing body of Gray's Inn, one of the four professional associations to one of which every barrister in England and Wales must belong); John Hendy Q.C.; Michael Mansfield Q.C.; Bushra Ahmed; Sarah Bourke; Matthew Cartledge; Steve Cottingham; Georgina Hirsch; Catrin Lewis; Alastair Logan CBE (Commander of the British Empire); Damian McCarthy; Bronwyn McKenna; Gary Morton; Gareth Peirce; Greg Powell; Michael Seifert; Geoffrey Shears; Elizabeth Woodcraft

**Chile: Judge Juan Guzmán Tapia**

**Chile:** Group of Family Members of Executed Political Figures (Agrupación de Familiares de Ejecutados Políticos de Chile); National Group of Former Political Prisoners of Chile (Agrupación Nacional de Ex Presos Políticos de Chile)

**Spain: Federico Mayor Zaragoza**

**Spain:** Pro Human Rights Association of Spain (Asociación Pro Derechos Humanos de España); Spanish Association for the International Law of Human Rights (Asociación Española para el Derecho Internacional de los Derechos Humanos); Justice and Society Association (Asociación Justicia y Sociedad); Free Association of

Lawyers of Madrid (Asociación Libre de Abogados de Madrid); Free Association of Lawyers of Málaga (Asociación Libre de Abogados de Málaga); Free Association of Lawyers of Asturias (Asociación Libre de Abogados de Asturias); Canarian Association of Lawyers for Peace and Human Rights (Asociación Canaria de Juristas por la Paz y los Derechos Humanos); Aragonian Observatory for the Western Sahara (Observatorio Aragonés para el Sáhara Occidental); International Association of Lawyers for the Western Sahara (Asociación Internacional de Juristas por el Sáhara Occidental); Professor Anna M. Badía Martí (international public law professor, University of Barcelona); Professor Javier Chincón Álvarez (international public law professor, Complutense University, Madrid); Professor Pedro Expósito (international law professor, University of Málaga); Professor Carmelo Faleh Pérez (international public law professor, University of Las Palmas of the Grand Canaries); Professor Diana Malo de Molina y Zamora (constitutional law professor, University of Las Palmas of the Grand Canaries); Professor Benito Reverón Palenzuela (procedural law professor, University of La Laguna, Tenerife); Max Adam Romero; Pascuel Agueló Navarro; Paulino Álamo Suárez; Ignacio Almandoz Ríos; Pedro Amador Jiménez; José María Arando González; Bruno Armas Domínguez; Inés

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**Panama:** Ecumenical Committee of Panama (Comité Ecuménico de Panamá); National Indigenous Lawyers Union of Panamá (Unión Nacional de Abogados Indígenas de Panamá); Coordinator of Human Rights of People Panama (Coordinadora Popular de Derechos Humanos de Panamá); Peace and Justice Service in Panama (Servicio Paz y Justicia en Panamá); Association of Independent Attorneys of Panama (Frente de Abogados Independientes de Panamá); Istmeña Academy of International Law (Academia Istmeña de Derecho Internacional); Latin American Academy of International Law (Academia Latinoamericana de Derecho Internacional); Columbian-Panamanian Institute of Procedural Law (Instituto Colombo Panameño de Derecho Procesal); Alternative Legal Assistance of Panama (Asistencia Legal Alternativa de Panamá); Social Training Center of Panama (Centro de Capacitación Social de Panamá); Association of Litigant Lawyers of Panama (Asociación de Abogados Litigantes de Panamá); Dr. Hernando Franco Muñoz (former legal advisor of the President of the National Assembly of Panama as well as the Assembly's international relations legal advisor and currently Director of the Department of Public Law, Department of Law and Political Science at the University of Panama); Lic. Ramiro Guerra Morales (Member of the Board of Directors, National College of Attorneys, Panama); Lic. Carlos

Ayala Montero (Advisor to the National Assembly's Commission on Work and Social Welfare and Executive Director of the Panamanian Academy of Labor Law; former professor at the University of Panama and author of 8 legal and sociological books)

**Mexico:** Human Rights Program at the Autonomous University of Mexico City (Programa de Derechos Humanos, Universidad Autónoma de la Ciudad de México); Enrique González Ruiz, Camilo Pérez Bustillo

**Argentina:** Argentinean League for the Rights of Man (Liga Argentina por los Derechos del Hombre); Argentinean League for the Rights of Man Rosario (Liga Argentina por los Derechos del Hombre Rosario); Family Members of Those Who Have Disappeared or Been Detained for Political Reasons Rosario (Familiars de Desaparecidos y Detenidos por Razones Políticas Rosario); Center of Study and Investigation of Human Rights (Centro de Estudio e Investigación en Derechos Humanos); Permanent Assembly for Human Rights Rosario (Asamblea Permanente por los Derechos Humanos Rosario)

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IN THE

*Supreme Court of the United States*

RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MENDINA,  
PETITIONERS

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE  
INTERNATIONAL ASSOCIATION OF DEMOCRATIC  
LAWYERS, AMERICAN ASSOCIATION OF JURISTS,  
INDIAN ASSOCIATION OF LAWYERS, DROIT  
SOLIDARITE, THE HALDANE SOCIETY, ITALIAN  
ASSOCIATION OF DEMOCRATIC LAWYERS,  
JAPANESE LAWYERS INTERNATIONAL  
SOLIDARITY ASSOCIATION, THE NATIONAL  
UNION OF PEOPLES' LAWYERS OF THE  
PHILIPPINES, PORTUGUESE ASSOCIATION OF  
DEMOCRATIC LAWYERS, AND PROGRESS  
LAWYERS NETWORK OF BELGIUM  
IN SUPPORT OF PETITIONERS

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## STATEMENTS OF INTEREST

Amici are organizations of lawyers and jurists throughout the world who have been watching this case with great concern for many years. Amici know that Miami is home to a very large Cuban exile population. This population supports many political and paramilitary groups dedicated to the overthrow of the Castro government. This Court and the international community have long recognized that criminal defendants have the right to a fair trial by an impartial fact finder. Amici submit this amicus brief to inform this court of the international concurrence with the Defendants' claims in their petition that they did not get a fair trial in Miami, and to underscore that Petitioners have stated important reasons for this Court to grant the writ.

All of the parties have consented in writing to the filing of this brief.<sup>1</sup>

**International Association of Democratic Lawyers:** The International Association of Democratic Lawyers (IADL) is an international organization of lawyers and jurists with member associations and individual members in over 90 countries. IADL has consultative status in the United Nations, at Economic and Social Council of the United Nations, (ECOSOC), the United Nations Educational Scientific and Cultural Organization (UNESCO), and the United Nations

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<sup>1</sup>Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity other than amici curiae, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Childrens Emergency Fund (UNICEF). IADL was founded in 1946 by a large group of lawyers, many of whom served as prosecutors at the Nuremberg trials. The first President of IADL was Rene Cassin, the French jurist who is a main author of the Universal Declaration of Human Rights, (UDHR) whose 60th Anniversary was celebrated last year.<sup>2</sup> IADL's request to participate as amicus is consistent with its purposes. IADL members throughout the world, were greatly distressed that the Court did not grant the motion to change venue requiring the case to be tried in Miami. The record in the case shows these groups were well known, and their activities widely publicized in the Miami media. Many of their activities are referenced in the initial 11th Circuit panel decision and in the dissent in the en banc decision and are not contested by the government, or the majority in the en banc decision. The evidence provided to the court showed their influence on the Miami community was immense. IADL is concerned that the lower courts refused to properly weigh the evidence of prejudice in determining whether to change venue. IADL filed an amicus brief in the Court of Appeals claiming, as here, that the defendants were denied a fair trial in Miami. IADL's interest in seeking to uphold the right to trial by impartial jurors motivates the organization to participate as amicus in support of the Petitioners request that the Writ of Certiorari be granted.

**American Association of Jurists:** The American Association of Jurists (Asociación Americana de Juristas), "AAJ", is an international, non-governmental organization of lawyers and jurists,

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<sup>2</sup>For further information on IADL see Appendix I.

founded in Panama in 1975. Since 1989 AAJ has had consultative status with the Economic and Social Council of the United Nations. AAJ also has permanent representatives at the United Nations headquarters in New York and Geneva.<sup>3</sup> AAJ has duly constituted national chapters and affiliates in Argentina, Brazil, Bolivia, Canada, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Peru, Dominican Republic, Paraguay, Puerto Rico and Venezuela, as well as individual associates or coordinating committees in the United States, Panama, Colombia, Martinique, Mexico and Haiti. AAJ is a regional affiliate of IADL. Since its founding AAJ has organized many activities in the American Continent and issued statements, on behalf of itself and its chapter affiliates consistent with its objectives, among them, defending and advocating for the right to due process and an impartial and fair trial. AAJ has been following this case with great concern since its commencement in the United States District Court for the Southern District of Florida. Furthermore, AAJ sent an observer mission to the hearing before the Court of Appeals for the Eleventh Circuit on August 20, 2007, which included former Justice Juan Tapia Guzman of Chile, William Sloan of Canada and Vanessa Ramos, President of AAJ. AAJ has issued statements expressing concern about the failure to provide defendants with a fair trial and an impartial jury, as well as denying defendants a change of venue. It is for these reasons that AAJ seeks to express its views to this court by participating as an amicus in support of the Petition for Certiorari.

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<sup>3</sup> For further information on AAJ see Appendix I.

**The Indian Association of Lawyers:** The Indian Association of Lawyers (IAL) was founded in 1968, and is one of the leading organizations of lawyers in India with a membership of over 100,000 throughout the country. Its membership is open to lawyers, judges, law teachers, researchers and law students. IAL has since been active in various fields in India. IAL is affiliated to the International Association of Democratic Lawyers [ IADL ] and takes keen interest in its activities. IAL, in cooperation with IADL, has organized eight international lawyers Conferences in India on the issues of human rights, the fight against terrorism, peace and development. IAL has been keenly following the case of the five Cuban defendants who were tried in Miami. IAL supported the call for change of venue on the ground that they did not receive a fair trial in Miami in such an atmosphere. We join and support the amicus brief that is being filed by the International Association of Democratic Lawyers on the issue of improper venue.

**Droit Solidarité:** Droit Solidarité (DS) is a French non governmental organization of lawyers, jurists, law teachers and students. DS was founded in 1990 and has over 300 members. (DS) is a member of the International Association of Democratic Lawyers (IADL).<sup>4</sup> DS has a policy of sending French lawyers to attend (as observers) trials where human rights, including the right to fair and equitable legal treatment, are at stake. Prior to the present application, DS has organized public events, seminars and round tables dedicated to the analysis of this case. A major event was a conference hosted in the Senate of

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<sup>4</sup>For further information on Droit Solidarite see Appendix 1.

the French Republic, Palais de Luxembourg in Paris on April 19, 2008. Defendant Guerrero's lawyer, and family members of these five defendants, journalists, as well as representatives of several human rights and lawyers' associations from America, Africa and European Union participated. This event was attended by senators, lawyers, academics, political scientists, law students and representatives of civil society. At this event DS noted that the United Nations Working Group on Arbitrary Detentions Opinion n°19/2005 found: "The (US) Government did not deny the fact that (...) the biased climate and preconceived sentiments against the defendants has persisted in Miami and contributed to the defendants being considered guilty from the beginning (...) and that Miami was not the appropriate venue to organize a trial as it was knowingly almost impossible to select impartial jurors in a case involving Cuba (...)

**The Haldane Society:** The Haldane Society was founded in 1930 and named for Viscount Haldane, the first Lord Chancellor appointed by the first British Labour Government. Its members comprise practicing barristers and solicitors, law professors, students and legal workers and past members include numerous senior judges and government ministers.<sup>5</sup> The Haldane Society affiliated to the International Association of Democratic Lawyers (IADL) in 1947 and throughout the past six decades Haldane's members have participated in and contributed to many of the IADL's conferences, seminars, missions and publications. Several Haldane members have worked in recent years in the United States, notably on death penalty and

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<sup>5</sup> For further information on the Haldane Society, see Appendix I.



prisoners' rights issues as well as on issues of torture, inhuman and degrading treatment arising out of the Guantánamo Bay Detention Center. Some members of Haldane were present in the United States during the Elian Gonzales controversy and have reported on the violently hostile and emotive atmosphere prevailing in Miami precisely at the moment when the accused in the instant case first came to trial. On the facts alleged by counsel for the accused, Haldane respectfully finds it hard to imagine a case more demanding and necessitating a change of trial venue than the instant case. For these reasons Haldane seeks to participate as amicus in support of the petition for certiorari.

**Italian Association of Democratic Lawyers:**

The Italian Association of Democratic Lawyers, was founded in 2000 and has 500 members who work as barristers, judges and law professors in 20 provinces of Italy.<sup>6</sup> Since its founding the Association has organized many conferences, meetings and activities in support of human rights, democracy and the rule of law in Italy, Europe and the rest of the world. As lawyers it must be a concern that the influence of the Cuban community of Miami was a determining issue in the trial. The Italian Association is affiliated with the IADL. The Association has been following this case since 2004. An observer from the Association has attended the hearings in the Court of Appeals, and supported the conference in Paris in April of 2008.

**Japanese Lawyers International Solidarity Association:** The Japanese Lawyers International

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<sup>6</sup>For further information on the Italian Association of Lawyers, see Appendix I.

Solidarity Association (JALISA), was founded in 1955 and has branches throughout Japan. JALISA is affiliated with the International Association of Democratic Lawyers and has been an active member of the organization. While JALISA's main activities have been to help rid the world of nuclear weapons and to promote peace, the organization is very active in supporting human rights and all the goals of the United Nations Charter.<sup>7</sup> JALISA has been following the case of these defendants for many years and has issued statements indicating concern about the fairness of the trial in Miami. JALISA publishes a journal known as "Inter Jurist" in which the organization has expressed its concern about whether these defendants received a fair trial.

**The National Union of Peoples' Lawyers (NUPL) of the Philippines:** The NUPL was founded on 15 September 2007 as a nationwide association of human rights lawyers in the Philippines.<sup>8</sup> The fourth point of the NUPL General Program of Action states that NUPL shall campaign, advocate and lobby for the liberties, freedoms and rights of the Filipino people as well as those of other peoples of the world". With this vision, the NUPL became an active member of the International Association of Democratic Lawyers (IADL). The NUPL hereby submits that the Honorable Court can take judicial notice of the fact that Miami, Florida is home to a great number of Cuban exiles hostile to Fidel Castro, the Cuban government, and its supporters. The fact that the these Defendant's

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<sup>7</sup>For further information on the Japanese Lawyers International Solidarity Association, see Appendix I.

<sup>8</sup>For further information on NUPL, see Appendix I.

are agents of the Cuban government is glaring enough to make them easy prey for anyone vindictive to the Cuban government. Hence, Miami, Florida is the least likely of places where these defendants may secure an independent and impartial trial, thus the great need for a change of venue and new trial of their case.

**Portuguese Association of Democratic Lawyers:** The Portuguese Association of Democratic Lawyers (APJD) was founded in the 10th of December 1948, the date of the enactment of the Universal Declaration of Human Rights. The Association is affiliated with IADL.<sup>9</sup> APJD had to operate in a clandestine fashion from its founding until April 1974 when democracy was restored in Portugal. In light of this history, APJD knows how important the right to a fair trial by an impartial tribunal is in a democratic society. It is known world wide that Miami is the center of activity for many groups which seek to attack Cuba and oust its government and that these groups have significant influence in Miami.

**Progress Lawyers Network based in Belgium:** Progress Lawyers Network (PLN) was founded in 2003 as a network of progressive lawyer's offices in Brussels, Antwerp and Ghent.<sup>10</sup> PLN has since then brought together many lawyers, jurists, university staff and human rights activists in Belgium as well as abroad.<sup>10</sup> PLN shares the concern of the Petitioners that Miami was not the right place for their trial. PLN believes that the well known hostility of the powerful Cuban exile community in Miami made a fair

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<sup>9</sup>For further information on the APJD, see Appendix I.

<sup>10</sup>For further information on the PLN, see Appendix I.

trial impossible for petitioners as agents from Cuba who were trying to stop the attacks from the very groups which were responsible for planning and carrying out hostile terrorist acts against Cuba. This case is one instance when the international community can see clearly what the court in Miami did not recognize, which is holding a trial of persons sympathetic to Cuba in Miami, will deny them a fair trial.

## **BRIEF OF AMICI CURIAE**

### **I. Introduction:**

Amici file this brief to urge this Court to grant the writ of certiorari to review and overturn the convictions of these defendants. The Petition for Certiorari argues, that the defendants were denied a fair trial, in part, because the District Court repeatedly denied the defense motions to change venue to the contiguous City of Fort Lauderdale which did not possess the prejudices which existed in Miami both through community prejudice and pretrial publicity. The Petition claims that the District Court and the Court of Appeals imposed standards for changing venue inimical to the right to a trial by an impartial jury, and applied the incorrect standard of review on appeal. Amici argue herein that the Petitioners' have identified significant errors in the decisions below on the venue issue such that this Court should grant the writ.

Amici, the International Association of Democratic Lawyers, the American Association of Jurists, the Indian Association of Lawyers, Droite

Solidarite, the Haldane Society, Italian Association of Democratic Lawyers, the Japanese Lawyers International Solidarity Association, the Portuguese Association of Democratic Lawyers, the National Union of Peoples' Lawyers, and the Progress Lawyers Network are organizations of lawyers and jurists which have in common the goal of promoting and securing human rights around the world. Amici support the petition for the Writ of Certiorari and provide the arguments below for this Court's consideration.

## **II. The Right to Trial By Impartial Fact Finders is A Universally Recognized Right**

The impartiality principle is a universal principle. It is enshrined in the Sixth Amendment to the Bill of Rights and provides defendants with the right to have their cases heard by an **impartial** jury.

The impartiality principle is enshrined in other international instruments, many of which have been signed and/or ratified by the United States.

Article 10 of the Universal Declaration of Human Rights states: "Everyone is entitled in full equality to a fair and public hearing by an independent and **impartial** tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Article XXVI section 2 of the American Declaration on the Rights and Duties of Man, states: Every person accused of an offense has the right to be given an **impartial** and public hearing, and to be tried by courts previously established in accordance with

pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Article 14, sub-section 1.1 of the International Covenant for Civil and Political Rights states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and **impartial** tribunal established by law.

In addition to the international instruments which the United States has signed and/or ratified, Article 6 subsection 1 of the European Convention on Human Rights states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and **impartial** tribunal established by law."

Similarly, Article 7, section 1.1 of the African Charter on Human and People's Rights states:

"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried

within a reasonable time by an **impartial** court or tribunal.”

There is no more settled rule in the United States Constitution than the principle that due process requires that every defendant be given a fair trial. This principle is further embodied in the Constitution's requirement that **every juror must be impartial**. It is a violation of the Due Process Clause made applicable to the states through the Fourteenth Amendment that a biased juror should not and cannot serve on a jury in a civil or criminal case. In *Irvin v Dowd*, 366 U.S. 717, 721-23 (1961), this court stated:

“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. ‘A fair trial in a fair tribunal is a basic requirement of due process.’ (Citations omitted).”

See also, *Virgil v Dretke*, 446 F.3d 598, (5th Cir. 2006), wherein the Court stated:

“We are also mindful that certain errors in the trial process are so basic to a fair trial as to defy harmless error review. It is clearly established that the Supreme Court views the denial of the right to an impartial decision maker to be such an error that taints any resulting conviction with constitutional infirmity.”



### III. Venue Requirements in the Constitution Were Never Meant to Diminish The Right of the Accused to An Impartial Jury

The Constitution and the Sixth Amendment contain venue provisions as follows: Article III section 2, clause 3 requires that "[T]he Trial of all Crimes, except in Cases of Impeachment, shall be . . . held in the State where the said Crimes shall have been committed." The Sixth Amendment guarantees a federal criminal defendant both the right to be tried by an impartial jury and the right to a trial in the State and district where the crime was committed.

The history of these provisions shows that they were meant to **protect criminal defendants**. The venue provision in Article III was not initially controversial because it was "a response to the English practice of the 1760's and 1770's of transporting colonists to another colony or England for trial." This practice had been protested as denying the colonists a fair trial by preventing the person from presenting an adequate defense, or allowing the British government to find juries sympathetic to its position.<sup>11</sup> See, Scott Kafker, "The Right of Venue and the Right of Impartial Jury: Resolving the Conflict in the Federal Constitution," 52 U.of Chi. Law Rev. 729 (1985).

The venue language therefore was designed to enhance a defendant's right to a fair trial not to be used

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<sup>11</sup>The author of this comment primarily addressed the issue of whether the right to seek a change of venue resided only with the defendant, allowing defendants not to make a motion to change venue, and seek dismissal of the case because an impartial jury could not be found in the district.

as a barrier to changing venue, where there is a reasonable likelihood that an impartial jury cannot be impaneled in that venue. The venue provisions were never meant to trump the impartiality principle.<sup>12</sup> The Petitioners' have articulated the proper standards for motions for change of venue and standard of review of such rulings.

#### **IV. The Lower Courts' Failure to Change Venue Undermined The Universal Impartiality Principle**

When reading the protective nature of the venue provisions of the Constitution in conjunction with the primacy of the impartiality principle, Courts in general (and in this case in particular) are required to review requests for change of venue in order to **give maximum effect to the impartiality principle**. This means courts must consider factors which impact the impartiality principle in addition to direct evidence of specific prejudice against specific defendants. In this case the District Court made no findings of fact with respect to the evidence submitted by defendants regarding the prejudice of the Miami community against anyone associated with the Cuban government. The majority in the en banc decision refused to consider any evidence of prejudice which did not relate to these specific defendants. That is, the majority in the en banc decision refused to include in its determination of whether the defendants could receive a fair trial in Miami: (1) the evidence presented of the strength, of the extremist paramilitary groups in Miami, and the pervasive hostility they and their political supporters

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<sup>12</sup>This is especially true in this case given that the change of venue was to a different city within the same judicial district.

had generated in Miami toward anyone supportive of the Cuban government, and (2) the inflamed passions against those supporting Cuba generated by both the shoot downs and the Elian Gonzalez matter. As noted further below, the majority opinion in the en banc decision on venue, applied an incorrect standard in evaluating the prejudice issue and, in so doing, undermined the impartiality principle.

## V. The Lower Court's Should Have Changed Venue:

The lawyers for the defendants submitted significant evidence to support their initial change of venue motion as well as their ongoing renewals of the motion and post trial motion for a new trial. The evidence was not only related to pre-trial publicity, but also the tenor of the publicity.<sup>13</sup> The defendants also

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<sup>13</sup> George Gedda, **Federal Officials Say 10 Arrested, Accused of Spying For Cuba**, Miami Herald, Sept. 14, 1998, 165a; Manny Garcia, Cynthia Corzo, Ivonne Perez, **Spies Among Us: Suspects Attempt To Blend In, Miami**, Miami Herald, Sept. 15, 1998; David Lyons, Carol Rosenberg, **Spies Among Us: U.S. Cracks Alleged Cuban Ring, Arrests 10**, Miami Herald, Sept. 15, 1998; Fabiola Santiago, **Big News Saddens, Angers Exile Community**, Miami Herald, Sept. 15, 1998; Juan O. Tamayo, **Arrest of Spy Suspects May Be Switch In Tactics**, Miami Herald, Sept. 15, 1998; Javier Lyonnet, Olance Noguerras, **Cae Red de Espionaje de Cuba /FBI Viro al Reves Casa de Supuesto Cabecilla** and Pablo Alfons, Rui Ferreira, **Cae Red de Espionaje de Cuba/Arrestan a 10 en Miami**, Nuevo Herald, Sept. 15, 1998; **La Habana Contra El Pentagono ("Havana versus the Pentagon")/Estructura de la Red de Espionaje**, Nuevo Herald, Sept. 15, 1998; **Arrest of alleged Cuban spies demands vigorous prosecution**, Sun-Sentinel, Sept. 16, 1998; Juan O. Tamayo, **Miscues Blamed on Military's Takeover of Cuban Spy Agency**, Miami Herald, Sept. 17, 1998; David Kidwell, **Motion**

provided community surveys<sup>14</sup> and instances during the trial when defendants continued to hold demonstrations and press conferences as a way of pressuring the jury.<sup>15</sup>

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**Could Delay Trials of Alleged 10 Cuban Spies**, Miami Herald, Oct. 6, 1998; **David Lyons, Cuban Couple Pleads Guilty in Spying Case**, Miami Herald, Oct. 8, 1998; **David Kidwell, Three More Accused Spies Agree To Plead Guilty**, Miami Herald, Oct. 9, 1998; **Carol Rosenberg, Couple Admits Role in Cuban Spy Ring**, Miami Herald, Oct. 22, 1998; **Juan O. Tamayo, U.S.-Cuba Spy Agency Contacts Began A Decade Ago**, Miami Herald, Oct. 31, 1998; **David Kidwell, U.S. Tries To Tie Espionage Case To Planes' Downing**, Miami Herald, Nov. 13, 1998, 166a; **Carol Rosenberg, Identities of 3 Alleged Spies Still Unknown**, Nov. 14, 1998; **Juan O. Tamayo, Spies Among Us/Castro Agents Keep Eye on Exiles**, Miami Herald, Apr. 11, 1999; **Carol Rosenberg, Shadowing of Cubans A Classic Spy Tale**, Miami Herald, Apr. 16, 1999; **Cuban Spy Indictment/Charges Filed In Downing of Exile Fliers/The Brothers to the Rescue Shootdown**: **David Lyons, Castro Agent In Miami Cited By U.S. Grand Jury**, **Juan O. Tamayo, Brothers to the Rescue Shootdown/Top Spy Planned Brothers Ambush**, and **Elaine de Valle, Relatives: Charges Fall Short**, Miami Herald, May 8, 1999; **Confessed Cuban Spy Receives Seven Years**, Miami Herald, Jan. 29, 2000; **Contrite Cuban Spy Couple Sentenced**, Miami Herald, Feb. 3, 2000; **Miami Spy-Hunting**, Miami Herald, Feb. 19, 2000; **Carol Rosenberg, Confessed Cuban Spies Sentenced To Seven Years**, Miami Herald, Feb. 24, 2000; **Terrorism Must Not Win In Brothers to the Rescue Shootdown**, Miami Herald, Feb. 24, 2000; **Brothers Pilots Remembered** (photo), Miami Herald, Feb. 25, 2000; **Shot-down Brothers Remembered**, Miami Herald, Feb. 25, 2000, 167a.

<sup>14</sup> See 298a -300a which states in pertinent part: "The motion for new trial was also supported by a public opinion survey conducted by legal psychologist Dr. Kendra Brennan and a study by Florida International University's Professor of Sociology and Director of the Cuban Research Institute Dr. Lisandro Pérez. By affidavit, Dr. Brennan characterized the results of a poll of Miami Cuban-Americans as reflecting "an attitude of a state of war ... against Cuba." She reviewed Moran's survey (which the District Judge

The voir dire of the jurors and potential jurors shows that many of these jurors were not only hostile to the regime in Cuba, but some expressed concern for their personal safety or livelihood if they voted to acquit these defendants. The jury selection began with 168 prospective jurors. 86 jurors were immediately dismissed for reasons language, hardship, illness or availability. Of the 82 remaining jurors, 32 of them openly stated negative opinions of Cuba, Castro, and Communism or questioned their ability to be fair and

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had criticized) and stated that it "accurately reflects profound existing bias against those associated with the Cuban government in Miami [-]Dade County" where "[p]otential jurors ... would be impervious to traditional methods of detecting and curing bias through voir dire and court instruction." Brennan determined that, although 49.7 percent of the local Cuban population strongly favored direct United States military action to overthrow the Castro regime, only 26 percent of the local non-Cuban population and 8.1 percent of the national population favored such action. Similarly, 55.8 percent of the local Cuban population strongly favored military action by the exile community to overthrow the Cuban government but only 27.6 percent of the local non-Cuban population and 5.8 percent of the national population favored such action. She concluded that there was "an attitude of a state of war between the local Cuban community against Cuba" which had "spilled over to the rest of the community" and had a "substantial impact on the rest of the Miami-Dade community." She found that the documented community bias showed a "deeply entrenched body of opinions [so entrenched as to often not be consciously held] that would hinder any jury in Miami-Dade County from reaching a fair and impartial decision in this case." Dr. Pérez concluded that "the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero ... even if the jury were composed entirely of non-Cubans, as it was in this case. His conclusion was based on a number of factors, including the demographics of the area and the cohesiveness, political impact, interests, and emotional concerns of the Cuban community.

<sup>15</sup>See, 200a-201, and 260a

impartial because of the possible reactions of the Cuban community in Miami or for fear of their or their families safety, or had personal contact with the victims and/or victims families, or had bias about the case from media reports (representing 40% of the potential jurors). For example, Peggy Beltran would not believe any testimony from any admitted Cuban Spy witnesses; David Cuervas said: "I will be little nervous and have some fear...for my own safety if I didn't come back with a verdict that was in agreement with the Cuban community at large", 247a; James E Howe Jr. believed that the Cuban government is an oppressive regime that needs to be overturned; Jess Lawhorn, Jr. was concerned about his ability to do his job because of the Miami Cuban community's public opinion; Luis Mazza did not like Cuban government and would not believe the defendant's testimony, 248a; Jenine Silverman stated that "Castro is a dictator"; Jose Teijeiro stated that Cuba was a "very bad government"; Belkis Briceno-Simmons did not believe in Cuban system of government; Ilena Briganti said "it would be difficult" to be fair; David Buker, who was not only a juror, but the foreperson of the jury, believed that Castro is a communist dictator, Mr. Buker was opposed to communism and he would like to see democracy established in Cuba, 249a; Haydee Duarte saw Castro as a dictator; Maria Gonzalez did not approve of the Cuban regime and was against communism Rosa Hernandez: believed the Cuban government was oppressive, 250a; Susan Kuk: believed it would be difficult to be fair and she also had personal contact with victims families; Lilliam Lopez was against the Republic of Cuba and didn't like communism; John McGlamery did not have a favorable view of Cuba, 251a; Hans Morgenstern had an obvious mistrust of



those affiliated with Cuban government and was concerned about returning a not-guilty verdict, 252a; Angel De La O could not make a fair judgment and was concerned about the welfare of his family in Cuba; Connie Palmer believed Castro is a bad person and she knew a passenger on Basulto's plane for 8 years, 253a; Joseph Paolercio was not happy with US-Cuban relations and had negative views of the Miami Cuban community; Barbara Pareira was worried about a verdict because of the Miami Cuban community and she had many close Cuban friends, 254a; Sonia Portalatin was against communism and had strong opinions about the Cuban government; Eugene Yagle had negative opinions about the Cuban government; John Gomez remembered Brothers to the Rescue and had heard someone in the group was a spy, 255a; Luis Hernandez might not believe a witness who was a Cuban communist; Florentina McCain knew that airplanes were shot down and memorials took place; Michelle Peterson was concerned about a verdict and its impact on the Miami Cuban community, 256a; Jessica de Arcos had personal contact with victims and/or families; Daniel Fernandez had personal contact with victims and/or families Tim Healty had personal contact with victims and/or families; Caroline Rodriguez had personal contact with victims and/or families, 257a; Plancencia knew many of the named witnesses, 258a.

The convergence of the Elian Gonzalez controversy at the time of the trial exposed an outraged and militant Cuban exile community. Its actions required armed intervention by the INS to support the return of Elian Gonzalez to his father in Cuba. This lingering effects of the Elian Gonzalez affair led the government in the *Ramirez* case to seek a change of



venue when charged with discrimination by a Cuban American based on its claim it could not get a fair trial in Miami.<sup>16</sup>

The attorneys for the five were accused of being agents of the Cuban government and the government in closing arguments made exceedingly inflammatory statements regarding the impact on the US of acquitting the defendants.<sup>17</sup> The first panel of the Court of Appeals which considered the evidence found the convergence of the above listed facts created a "perfect storm" which deprived these petitioners of a fair trial to in Miami. The en banc decision is striking for its failure to even acknowledge the record showing lack of partiality compiled by the original panel in its original ruling. It defies logic for a court, as the majority in the en banc decision holds, that pretrial publicity on issues related directly to the defendants is

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<sup>16</sup>In *Ramirez v. Ashcroft*, No. 01-4835-Civ-Huck (S.D.Fla.) the government filed its change of venue motion on 25 June 2002. In the Ramirez motion, the government argued: "the Elian Gonzalez matter was an incident which highly aroused the passions of the community and resulted in numerous demonstrations. The government requested "a change in the location/venue" "outside of Miami Dade County to ensure that the Defendant ... receive a fair and impartial trial on the merits of the case." They noted that, "[w]hile not requested," the court also had the discretion to transfer the trial to another judicial district. The government orally argued that there were no incidents "since 1985 that so polarized the community or that so affected every individual in the community as the Elian Gonzalez affair." 202a-203a

<sup>17</sup>During closing arguments, the government made a number of comments to which the defendants objected. For example, it was stated that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they convicted the "Cuban sp[ies] sent to ... destroy the United States." 198a.

the only information that the court will consider in assessing claims of presumed prejudice.

It is difficult to imagine a case where granting a change of venue motion was more appropriate and where this court's intervention is most required if the United States is going to honor its commitment to having impartial fact finders decide cases. Thus, this case presents a bell-whether test of United States' judicial system. The political overtones of this case are unmistakable given the lack of relations between the United States and Cuba, influenced to large degree by the power of the exile community in Miami.

Amici as members of the international community of jurists and lawyers were struck by the U.S. government's continued insistence on the Miami venue even after significant evidence was presented which should have demonstrated difficulties in fielding an impartial jury in Miami. The government's push for en banc review reveals the stark reality that the government knew, especially with respect to the conspiracy to commit murder charge, that the only possible way to obtain a conviction of these individuals was to keep the case in Miami. Unfortunately, it appears that the Justice Department needed to keep its proverbial finger on the scales to tip the balance in their favor, and in so doing engage in jury shopping rather than uphold the principle of impartiality. In this way the universal principal of impartiality was not upheld. This Court has the opportunity to correct this error.

**CONCLUSION**

For the foregoing reasons, Amici ask this court to grant the writ of certiorari.

Respectfully submitted,

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## **APPENDIX I**

### **FURTHER DESCRIPTIONS OF THE AMICI IN SUPPORT OF THEIR STATEMENTS OF INTEREST**

#### **International Association of Democratic Lawyers:**

IADL's purposes include:

To facilitate contact and exchanges of views among lawyers and lawyers associations of all countries to foster understanding and goodwill among them.

To work together to achieve the aims set out in the Charter of the United Nations.

To ensure common action by lawyers:

In the realm of law, the study and practice of the principles of democracy to encourage the maintenance of peace and cooperation among nations.

To restore, defend and develop democratic rights and liberties in legislation and in practice.

To promote the independence of all peoples and to oppose any restriction on this independence whether in law or in practice.

To defend and promote human and peoples' rights.

To promote the preservation of ecology and healthy environments.

To struggle for strict adherence to the rule of law and the independence of the judiciary and legal profession.

To defend peoples' rights to development and for conditions of economic equality and the enjoyment of the fruits of scientific progress and natural resources.

### **American Association of Jurists:**

The principles and objectives of AAJ are defined in Chapter 1, Art. 2 of its Statutes, which read as follows:

The principles and objectives of the American Association of Jurists are: a) self-determination of peoples, and full economic independence and the sovereignty of the State over its wealth and natural resources; b) to oppose imperialism, fascism, colonialism and neocolonialism, oppose racism and discrimination against women, indigenous peoples and national minorities; c) the defense of real peace based on the principles of peaceful co-existence between States of different social and economic systems; d) to defend and promote human rights, and the realization of better and more effective guarantees for their protection; e) to denounce and oppose repressive legislation in American States which contradicts and deviates from principles and objectives of the Association; f) to establish fraternal relations and common actions with jurists and their organizations throughout the world committed to objectives similar to those stated in our Statutes; g) to mobilize jurists of the American countries to develop joint actions to ensure the active involvement of the juridical science in the process of social and economic changes in their respective countries, which are consistent with the principles and objectives enumerated herein; h) the defense and protection of the legal profession as well as solidarity with jurists who are persecuted because their activity in abiding by the principles herein set forth.

### **Droit Solitarite**

#### **Purposes of Droit Solidarite (DS)**

As IADL , DS has as its purposes: bringing lawyers, judges, jurists, and law teachers together to work in order to achieve the aims set out in the United Nations Charter, as well as ensuring common action by lawyers in order to defend and promote human and peoples' rights, to struggle for strict adherence to the rule of law and independence of judiciary and legal profession as well as to encourage in the realm of law the study and practice of the principles of democracy making for the maintenance of peace and cooperation between nations. (DS) watches the way fundamental legal documents such as the 1948 Universal Human Rights Declaration and the 1966 International Covenant on Civil and Political Rights (ICCPR) are implemented whether in France or abroad.

### **Haldane Society**

#### **Purposes and activities of the Haldane Society:**

For over 75 years, the Haldane Society has been committed to the advancement of human rights and the rule of law, both domestically and internationally. It has provided consultative papers to governments and organises numerous conferences and lectures on issues including but not limited to international human rights law, employment issues, immigration and asylum, rights of criminal defendants, access to justice, equality and gender rights, housing law and environmental concerns. The Haldane Society has sent many fact-finding missions to countries around the world to observe trials where serious concerns have been raised about standards of fairness and compliance with

international norms guaranteed by such instruments as the International Covenant of Civil and Political Rights and the United Nations Convention Against Torture.

### **Italian Association of Democratic Lawyers**

As lawyers, engaged in the defense of the fundamental rights without any regard to the political or national identity of the defendant, it is important to ask whether the trial would have been different if this case involved people with identical accusations, if they had been tried in Miami but it had not be an issue that the people came from Cuba. The Italian Association believes that in this case, fair trials on other issues may be had in Miami, but given the influence of the hostile Cuban exile community the fact that the case involved persons trying to protect Cuba from attacks the accused could not obtain a fair trial in Miami. It is for this reason we ask this Court to review this decision, and require the case to be heard in a city other than Miami .

### **National Union of Peoples' Lawyers:**

#### **Purposes and activities of NUPL**

The NUPL is committed to the defense, protection, and promotion of human rights especially of the poor and the oppressed. After only more than a year since its formation, the NUPL has already established its presence in almost every region in the Philippines thereby becoming one of the largest organizations of human rights lawyers in the Philippines. The NUPL is directly engaged in litigation and legal consultancy as a venue for advocacy on issues affecting the rights of the



people and as an arena to serve them even more effectively and efficiently. It is directed towards the active defense, protection, and promotion of human rights covering the people's, including peoples from other countries, civil, political, social, economic, and cultural rights, including the advocacy and assertion of their inherent right to self-determination. As a principal mission, the NUPL is united and committed to render competent legal services, with the use of one's legal education, skills, training, knowledge, and experience, to the marginalized sectors for the upholding and promotion of their rights and freedoms.

### **Portuguese Association of Democratic Lawyers:**

#### **History and purposes of APJD.**

At the time APJD was founded it had to operate in a clandestine fashion due to existence of the dictatorship in Portugal. APJD remained clandestine until the end of the dictatorship in April 1974. Under the dictatorship human rights were not respected. Freedom of speech was criminally suppressed in special Court trials – then called “Plenary Courts” – and totally controlled by and obedient to the government and therefore without any independence whatsoever. During the dictatorship period, the Portuguese Association of Democratic Lawyers fought for the protection and respect of rights, with its members defending political prisoners in the struggle for freedom and democracy. Several lawyers were tried and sentenced to jail for their advocacy of democracy. After the reinstatement of a democratic regime in Portugal, Portuguese Association of Democratic Lawyers (APJD) was formally founded

and made its existence official. At all times the APJD sought to uphold the rights of the accused to have fair trials in impartial tribunals.

### **Progress Lawyers Network:**

#### **Activities of PLN**

PLN concentrates on four branches of law: social law, penal law, immigration law and family law. PLN offers special attention to the defence of union men and women and social law, it defends the progressive achievements of international law, the sovereignty of nations and the right of self determination of nations and their right to dispose of their own raw materials. PLN promotes the independence of the lawyers profession and for respect of the rights of the defense. PLN has organized symposiums with national and internationally renowned speakers on subjects such as "The impact of European anti-terrorist legislation on fundamental rights", "Labour law under pressure of the Lisbon strategy", "Migration and respect for fundamental rights", "Protection of union delegates" and so forth. PLN objects to any deterioration of fundamental rights and liberties on a national European and international level. PLN has showed interest in this case for several years and has sent observers to the oral hearings of 2004, 2006 and 2007. PLN has publicized its observations about this case throughout Belgium and among European lawyers and jurists generally with the result that all who hear of the case, are disappointed that the Court did not change venue out of Miami.

PLN is concerned about the respect for the fundamental right of fair trial which is recognized as a general principle of justice under the Belgian rule of law, as well as by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 14 of the International Covenant on Civil and Political Rights. The United States, since its founding, has recognized the right to a trial by an impartial jury and has upheld this principle on numerous occasions.

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**In the Supreme Court of the United States**

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Eleventh Circuit**

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**BRIEF OF NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS AMICUS  
CURIAE IN SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

Whether the Eleventh Circuit failed to account for the historical importance of the right to change venue to avoid pervasive community prejudice.

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## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS* *CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 attorney members and 28,000 affiliate members in all fifty states. The NACDL is an affiliate of the American Bar Association and has full representation in the ABA's House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, advance knowledge of the law among criminal law practitioners, and encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL's objectives include ensuring due process for persons accused of crime, promoting the proper and fair administration of criminal justice, and preserving the protections guaranteed to defendants by the United States Constitution.

The NACDL urges the Court to grant the petition and review the venue transfer ruling below, which we believe undermines a fundamental right of criminal defendants.

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

## SUMMARY OF ARGUMENT

The right of a criminal defendant to transfer venue to avoid severe community prejudice reflects values originating in early English and colonial practice that the Framers enshrined in our Constitution after deliberative debate. That right is embodied in two constitutional provisions.

Article III, Section 2, Clause 3 of the Constitution provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Constitution's Sixth Amendment provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

The Article III provision addresses the location of trial and thus is a venue provision, while the Sixth Amendment provision addresses the place from which jurors are selected and thus is a vicinage provision. These provisions reflect the long established common law rule that a defendant has a right to be tried where the alleged crime occurred rather than be transported to a distant locale and forced to forfeit the procedural advantages of being adjudged in one's home court. The vicinage right was, therefore, a right

historically held by the defendant to protect against malicious or unfair prosecution. It was not intended to alter the long-established common law rule that allowed the defendant to waive that right when widespread community prejudice impeded his ability to a fair trial by an impartial jury, a right also incorporated in the Sixth Amendment. The restrictive approach of the courts below to this issue runs counter to the historical foundation of these provisions. As a result, petitioners were convicted by a jury of the vicinage at the expense of their right to trial by an impartial jury.

### ARGUMENT

As this Court explained in *Gropi v. Wisconsin*, 400 U.S. 505, 511 (1971), its authorization of venue changes to avoid pervasive community prejudice “echoes more than 200 years of human experience in the endless quest for the fair administration of justice.” However, the Court’s decisions on this issue lack a detailed discussion of the historical background to the Sixth Amendment’s vicinage provision. This brief offers a brief summary of that history, which amicus believes supports the need for this Court to review whether the Eleventh Circuit’s treatment of the transfer of venue issue departed from the historical meaning of the Sixth Amendment.

#### A. The Right To Transfer Venue To Avoid Community Prejudice Is Rooted In Early English Practice

Juries were not always the impartial administrators of justice that we know today. The original Anglo-Saxon criminal jury consisted of individuals selected precisely because they were familiar with the alleged crime or knew the accused person. FRANCIS H.

HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 8 (1951). If the jurors were unfamiliar with the alleged criminal activity, they were expected to do their own investigation prior to trial and then testify at trial as to what they had learned. *Ibid.* Accordingly, it was imperative that juries be drawn from the community where the alleged crime occurred. This requirement was so strict that, if a crime was committed partly in one county and partly in another, the defendant could not be tried. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 61 (1944) (citing 3 COKE, INSTITUTES 48 (1797)); *People v. Powell*, 87 Cal. 348, 358 (1891) (citing Hawk. P.C., b. 2, c. 25; 1 CHITTY'S CRIMINAL LAW 177).

By the eighteenth century, the jury had gradually developed into "a body of impartial men who come into court with an open mind[,] instead of finding the verdict out of their own knowledge." Blume, *supra*, 43 Mich. L. Rev. at 60 n.8. As Lord Mansfield put it in 1764: "A juror should be as white Paper, and know neither Plaintiff nor Defendant, but judge the Issue merely as an abstract Proposition, upon the evidence produced before him." *Id.* at 60-61 (citing *Mylock v. Saladine*, 1 Wm. Blackstone Rep. 480, 481 (1781)).

Jurors nevertheless continued to be summoned from the locality where the crime was committed because of the obvious procedural advantages associated with having the trial near the scene of the crime and the defendant's likely residence. William Henry Jernigan, Jr., Note, *The Sixth Amendment and the Right to a Trial by a Jury of the Vicinage*, 31 Wash. & Lee L. Rev. 399, 404 (1974). According to Black-

stone, the sheriff was required to "return a panel of jurors, *liberos et legales homines, de vicineto*, that is, free holders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*344.<sup>2</sup>

But English courts began to depart from the strict vicinage rule as they came to recognize that a local jury in communities infected by prejudice could impede a fair trial. See *Zicarelli v. Gray*, 543 F.2d 466, 475 (3d Cir. 1976) (discussing the history of impartial juries). To ensure a fair trial, they therefore developed a common law rule allowing them to change venue upon a showing of extreme prejudice in the community. See *State v. Albee*, 61 N.H. 423, 425 (1881) ("As the right of trial by a jury *de vicineto*, or of the *visne* or neighborhood, was given for the protection of the subject, so the power was early given to the court of king's bench for the protection also of the subject to remove the venue upon a suggestion duly supported that a fair and impartial trial cannot be had").

This new and developing rule was applied in numerous cases. For example, in ordering a change of venue, the court in *The Queen v. County of Wilts*, 87 Eng. Rep. 1046, 1047 (1705), explained that "this matter concerning the whole county, suggestion may

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<sup>2</sup> Early discussions of the vicinage right often assumed that the locality where the crime occurred would be the same locality where the defendant resided, an assumption that made sense "in an age of restricted travel and mobility." Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. Pa. L. Rev. 399, 413 (1967).



be of any other county's being next adjacent, and the venue shall come from thence for the necessity of an indifferent trial." *Ibid.* Again, in *Rex v. Cowle*, 97 Eng. Rep. 587, 603 (1759), the court ordered a change of venue in an assault case, stating the rule that "whether a fair, impartial, or satisfactory trial or judgment can be had there, is a reason to remove from the highest." The court noted that the case was "a great contention in the borough" and that the "matter laid in the indictment arose from a warm dispute at the guild, upon a point of business, which produced a riot and tumult, that broke up the guild in great confusion." *Ibid.* Similarly, in *The King v. County of Cumberland*, 101 Eng. Rep. 507, 507 (1795), Lord Kenyon stated that it would be an "anomalous case in the law of England" were the court not to have the power to order a change of venue where the "inhabitants of the county are interested" in the verdict. And in *Poole v. Bennet*, 93 Eng. Rep. 909, 909 (1795), the court ordered a change of venue on motion where it appeared "there could be no fair trial" in the county where the matter arose.

Changing venue to ensure a fair trial remained an established feature of English criminal law practice. See *The King v. Thomas*, 105 Eng. Rep. 897 (1815); *The Queen v. Palmer*, 119 Eng. Rep. 762 (1856). As nineteenth-century treatises recognized, "[a]t common law, when a fair and impartial trial cannot be obtained, and the indictment has been removed into the king's bench by certiorari, the court have a power of directing the trial to take place in the next adjoining county when justice requires it." *Albee*, 61 N.H. at 425 (quoting 1 CHITTY'S CRIMINAL LAW 201).

Trial by a jury of the vicinage increasingly came to be seen during the eighteenth century as a right belonging to the defendant. As explained by the Chief Justice of the North Carolina Supreme Court, it facilitated the defendant's collection of evidence, gathering of witnesses, and empanelment of a sympathetic jury of neighbors. Henry G. Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. Pa. L. Rev. 197, 205 (1909). This understanding is manifest in parliamentary records from 1768 and 1769 debating the revival of 35 Henry VIII, c. 2 (1543), which permitted trial for treason committed in the American colonies to occur in England at a location chosen by the King. Blume, *supra*, 43 Mich. L. Rev. at 63-65. Parliamentary opponents of the measure argued vigorously that the law would deprive colonists of their basic right to a jury of their peers:

They commented forcibly on the cruelty and injustice of dragging an individual three thousand miles from his family, his friends, and his business, "from assistance, countenance, comfort and counsel necessary to support a man under such trying circumstances," in order that, with the Atlantic between him and his own witnesses, he might be put to peril of his life before a panel of twelve Englishmen, in no true sense of the word his peers. Of those jurymen the accused colonist would not possess the personal knowledge which alone would enable him to avail himself of his right to challenge; while they on their side would infallibly regard themselves as brought together to vindicate the law against a criminal of whose guilt the responsible authorities were fully assured.

Connor, *supra*, 57 U. Pa. L. Rev. at 206. Thus, by the mid-eighteenth century in England, a jury of the vicinage was viewed as a right of the defendant that he could waive if it would impede his right to a fair and impartial jury.

### **B. The Right To Transfer Venue To Avoid Community Prejudice Is Rooted In American Colonial Practice**

The colonists "at all times, insisted that they brought with them across the seas, either as their inalienable birthright, or, as guaranteed by the charters, trial by jury, as it existed in England." Connor, *supra*, 57 U. Pa. L. Rev. at 197. However, as tensions grew between Great Britain and its American colonies, many colonists believed that right to be increasingly jeopardized.

As noted above, beginning in December 1768 Parliament debated and approved the revival of a statute that would allow persons accused of committing treason in the American colonies to be transported to England for trial. Blume, *supra*, 43 Mich. L. Rev. at 63-64. This measure was met with fervent resistance in the American colonies. On May 17, 1769, Virginia delegates adopted an address to the King stating:

When we consider, that by the established Laws and Constitution of this Colony, the most ample Provision is made for apprehending and punishing all those who shall dare to engage in any treasonable Practices against your Majesty, or disturb the Tranquility of Government, we cannot, without Horror, think of the new, unusual, and permit us, with all Humility, to add, unconstitutional

and illegal Mode, recommended to your Majesty, of seizing and carrying beyond Sea, the Inhabitants of America, suspected of any Crime; and of trying such Persons in any other Manner than by the ancient and long established Course of Proceeding: For, how truly deplorable must be the Case of a wretched American, who, having incurred the Displeasure of any one in Power, is dragged from his native Home, and his dearest domestick Connections, thrown into Prison, not to await his Trial before a Court, Jury, or Judges, from a Knowledge of whom he is encouraged to hope for speedy Justice; but to exchange his Imprisonment in his own Country, for Fetters amongst Strangers? *Conveyed to a distant Land, where no Friend, no Relation, will alleviate his Distresses, or minister to his Necessities; and where no Witness can be found to testify his Innocence;* shunned by the reputable and honest, and consigned to the Society and Converse of the wretched and the abandoned; he can only pray that he may soon end his Misery with his life.

*Id.* at 64-65 (citing JOURNALS OF THE HOUSE OF BURGESSSES 1766-1769, at 215-216 (Kennedy, ed., 1906)) (emphasis added). It is hence not surprising that this offense was among those listed in the Declaration of Independence, which complained of "transporting us beyond Seas to be tried for pretended offenses" and "depriving us in many cases, of the benefits of Trial by Jury."

When the Constitution was subsequently submitted to the States for ratification, the lack of a nar-

rowly drawn vicinage provision was a major source of opposition, with many arguing forcefully that the Article III venue provision was too vague to protect defendants' rights. HELLER, *supra*, at 25; see also Connor, *supra*, 57 U. Pa. L. Rev. at 200. State legislators argued vigorously that the common law right to a jury of the vicinage must be more clearly secured for the benefit of defendants. A complaint lodged by Patrick Henry was typical:

This great privilege [is] prostrated by this paper. Juries from the vicinage being not secured, this right is in reality sacrificed. All is gone. \* \* \* Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. \* \* \* Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? \* \* \* And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind.

HELLER, *supra*, at 25. William Grayson, who became one of Virginia's first two Senators, seconded Henry's opposition, stating:

[W]here the governing power possesses an unlimited control over the venue, no man's life is in safety. \* \* \* The idea which I call true vicinage is, that a man shall be tried by his neighbors. But the idea here is, that he may be tried in any part of the state. \* \* \* The jury may come from any part of the state [and] they can hang any one they please, by having a jury to suit their purposes.

*Id.* at 26.

The outcry is well documented in the political literature of the time. For instance, one pamphlet objected to the "loss of the invaluable right of trial by an unbiassed jury, so dear to every friend of liberty." NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS* 457 (1997) (reprinting *Address and Reasons of Dissent of the Minority of the Pennsylvania Convention*, Dec. 12, 1787). Another complained of the "loss of the trial in the vicinage, where the fact and the credibility of your witnesses are known, and where you can command their attendance without insupportable expence, or inconveniences." *Id.* at 452 (reprinting *A Son of Liberty*, Nov. 8, 1787).

These substantial protests reflected a deeply felt concern for the rights of criminal defendants. Although the Constitution was ratified over these objections, demand for a Bill of Rights immediately followed.

### **C. The Ratification Of The Sixth Amendment Recognized That The Vicinage Provision Reflects A Criminal Defendant's Right**

Following ratification of the Constitution, James Madison, after extensive "labour and research" in the "grievances and complaints of newspapers—all the articles of Conventions—and the small talk of their debates," drafted the Bill of Rights. COGAN, *supra*, at 479 (reprinting Letter from Fisher Ames to Thomas Dwight, June 11, 1789). His draft included a vicinage provision that stated: "Trial of all crimes \* \* \* shall be by an impartial jury of freeholders of the vicinage." I ANNALS OF CONGRESS OF THE UNITED STATES 1st Cong., 1st Sess., at 452 (1789) (hereinafter I ANNALS).



That draft provision was a major source of debate in the first Congress. Concern persisted that the term "vicinage" was too vague. Aedamus Burke of South Carolina introduced an amendment after the provision was submitted to the House:

Mr. Burke moved to change the word "vicinage" into "district or county in which the offence has been committed." He said this was conformable to the practice of the State of South Carolina, and he believed to most of the States in the Union; it would have a tendency also to quiet the alarm entertained by the good citizens of many of the States for their personal security; they would no longer fear being dragged from one extremity of the State to the other for trial, at the distance of three or four hundred miles.

I ANNALS at 789. The proposed amendment was denied after another representative asserted that the term vicinage was "well understood by every gentleman of legal knowledge." *Ibid.* Ultimately, the House passed the vicinage provision as it was presented by Madison, apparently with a consensus understanding that the provision incorporated a defendant's right against transport to an unfair venue.

In the Senate, the vicinage provision did not fare as well due to apparent concern that the term "vicinage" was too vague and would afford insufficient protection to defendants. Little is known about the Senate debates surrounding the Sixth Amendment, but when the amendments were returned to the House, the vicinage provision had been deleted. HELLER, *supra*, at 32. A letter from Madison sheds some light on the debate:



[The Senators] are equally inflexible in opposing a definition of the locality of Juries. The vicinage they contend is either too vague or too strict a term: too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word juries—"with the accustomed requisites"—leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. \* \* \* The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point.

COGAN, *supra*, at 480-481 (reprinting Letter from James Madison to Edmund Pendleton, Sept. 23, 1789).

The House, however, refused to agree to the Senate's deletion. After a number of compromises, the vicinage provision was included in the Sixth Amendment, with its draft language changed to "State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," thereby allowing Congress to determine the boundaries of the districts. HELLER, *supra*, at 33-34. Although not conclusive, this ratification debate indicates that the adopters of the Sixth Amendment understood the vicinage provision, like the other provisions in that amendment, to be an important procedural protection for criminal defendants.

#### D. The Right To Transfer Venue To Avoid Community Prejudice Is Reflected In Early State Practice

Following ratification of the Constitution and adoption of the Bill of Rights, the States adopted their own constitutional provisions. These varied from State to State, but their content was generally consistent with the Federal Constitution's Sixth Amendment. Blume, *supra*, 43 Mich. L. Rev. at 67. The States also continued to follow the common law rule allowing change of venue in cases where a fair trial was jeopardized due to strong community prejudice.

Indeed, a number of states considered the right to change venue to obtain a fair trial to be so fundamental that they enshrined the common law doctrine into their state laws. For example, Arkansas enacted a statute granting defendants the right to change venue where "the minds of the inhabitants of the county in which the cause is pending, are so prejudiced against the defendant that a fair and impartial trial cannot be had therein." *Osborn v. State*, 24 Ark. 629, 632 (1867). See also *Kirk v. State*, 41 Tenn. 344, 350 (1860) (referring to an Act of 1827 that allowed defendants to change venue in criminal cases); *Dula v. State*, 16 Tenn. 511, 513 (1835) ("it would be a serious injury inflicted, in forcing a man to commit his life into the hands of a prejudiced jury" and noting that laws allowing for change of venue in criminal cases had "existed ever since the year 1808"); *Crocker v. Superior Court*, 208 Mass. 162, 174 (1911) ("Since the adoption of the Constitution, several statutes have been passed enlarging the venue of actions, in order to secure trials before indifferent jurors").

Courts also continued to assert their common law power to allow a defendant to change venue due to prejudice. As the New Hampshire Supreme Court explained, the practice of English courts to change the venue "became thoroughly engrafted upon the common law long before the independence of this country; and from that time forth not only has the practice prevailed in the courts of England, but the power is now exercised by the courts of very many if not all of our States, either by force of express statute or the adoption of the common law into the jurisprudence of the same." *Cochecho R.R. v. Farrington*, 26 N.H. 428, 436 (1853); see also *Crocker*, 208 Mass. at 175 ("it is an inherent power of common law courts to order a change [of venue] for the purpose of securing an impartial trial"). And state courts consistently articulated the right to a jury of the vicinage as a defendant's right that could be waived to obtain an impartial jury.<sup>3</sup>

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<sup>3</sup> See, e.g., *State v. Cutshall*, 110 N.C. 538, 543-544 (1892) (a defendant is entitled to a jury of his peers unless it is "necessary to remove the case to some neighboring county in order to secure a fair trial"); *People v. Powell*, 87 Cal. 348, 360-361 (1891) (venue cannot be changed without defendant's consent who "has only to show that a fair and impartial trial cannot be had in the county"); *Perteet v. Illinois*, 70 Ill. 171, 173 (1873) (trial court erred by refusing defendant's requested change of venue); *Wheeler v. State*, 24 Wis. 52, 52-53 (1869) (trial court erroneously ordered change of venue over defendant's objection; right exists to prevent defendant "from being taken out of the district for trial"); *State v. Denton*, 46 Tenn. 539, 541 (1869) (the "right of the accused to be tried in the county in which the offense is alleged to have been committed, is a right secured to him by the Constitution, and of which he cannot, in any case, be deprived without his consent given in open court"); *Osborn v. State*, 24 Ark. 629, 633 (1867) (change

In 1881, the New Hampshire Supreme Court, in a case cited by this court in *Groppi*, 400 U.S. at 511 n.12, articulated the nature and importance of the right to transfer venue in the face of community prejudice. *Albee*, 61 N.H. at 425. After a thorough review of the history of this principle, the court concluded:

It is the respondent's privilege to be tried in the county where the offence was committed. This provision in our bill of rights, designed for the protection of the accused, was regarded by the framers of the constitution as a privilege of the highest importance, because it would prevent the possibility of sending him for trial to a remote county, at a distance from friends, among strangers, and perhaps among parties animated by prejudices of a personal or partisan character. *But they did not intend to destroy his common-law right to a change of venue whenever a fair and impartial trial could not be had in the county where the fact happened.* The purpose of this constitutional provision was the protection, not the destruction, of individual rights. The constitutional provision is an affirmation of the prisoner's common-law right not to be tried at a distance from the county in which his of-

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of venue could not be ordered without defendant's consent); *Kirk v. State*, 41 Tenn. at 350 (defendant "may waive" a jury of the vicinage); *Cochrane v. State*, 6 Md. 400, 404 (1854) (noting that venue was changed at defendant's request); *Dula v. State*, 16 Tenn. 511, 512-513 (1835) (a defendant's right to a trial by a jury of the vicinage does not "prevent him from choosing another county [to] effectuate the great end, for which the one beforementioned was by the constitution secured").

fence is charged; and this common-law and constitutional right he may waive for the purpose of securing the fair trial which the constitution guarantees. A change of venue under such circumstances is calculated to preserve the system of jury trial in its purity, and thereby to increase the confidence of the community in its safety and usefulness.

*Id.* at 429 (citation omitted) (emphasis added).

Similarly, in *Crocker*, 208 Mass. at 178-179, which also was cited by this Court in *Groppi*, 400 U.S. at 511 n.12, the Massachusetts Supreme Court exhaustively reviewed the common law practice of changing venue to ensure a fair trial, concluding:

It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action.

This right of a criminal defendant to change venue to avoid pervasive prejudice and obtain a fair trial was later enshrined in this Court's decisions in *Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Groppi*, 400 U.S. 505. The Eleventh Circuit's decision in this case represents a giant step backwards from this enlightened jurisprudence.

\* \* \*

In sum, the principle that the vicinage right belongs to the defendant—to protect his right to a fair

trial—is rooted in the origins of the jury, in English practice, in the establishment of our Constitution and its Bill of Rights, and in post-enactment statutes and common law. The courts below gave insufficient weight and consideration to this fundamental right by failing to recognize that otherwise appropriate courtroom procedures (such as comprehensive *voire dire*) can amount to but “a hollow formality” in the face of pervasive community prejudice. *Rideau*, 373 U.S. at 726. Amicus urges this Court to grant the petition, reverse the judgment of the Eleventh Circuit, and uphold the right to a fair and impartial trial free from the taint of community prejudice.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The  
**Supreme Court of the United States**

RUBEN CAMPA, a.k.a. John Doe 3, a.k.a. Vicky, a.k.a.  
Camilo, a.k.a. Oscar; RENE GONZALEZ, a.k.a.  
Iselin, a.k.a. Castor; GERARDO HERNANDEZ, a.k.a.  
Giro, a.k.a. Manuel Viramontez, a.k.a. John Doe 1, a.k.a.  
Manuel Viramontes; LUIS MEDINA, a.k.a. Oso, a.k.a.  
Johnny, a.k.a. Allan, a.k.a. John Doe 2; ANTONIO  
GUERRERO, a.k.a. Rolando Gonzalez-Diaz, a.k.a. Lorient,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

**BRIEF AMICUS CURIAE OF  
NATIONAL JURY PROJECT  
IN SUPPORT OF PETITIONERS**

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## OTHER AUTHORITIES

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## IDENTIFICATION OF *AMICUS*

The National Jury Project is a Minnesota non-profit corporation originally established in New York in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP maintains offices in Minnesota; California; New York and New Jersey providing consultative and educational services to attorneys, the courts, and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

The NJP has assisted attorneys in trial preparation and jury selection in thousands of civil and criminal trials involving a wide variety of issues. It has conducted surveys of public opinion concerning criminal justice issues and analyzed the content and impact of pretrial publicity in hundreds of cases. Based on this research NJP members have submitted declarations and affidavits in numerous cases on issues of venue, pretrial publicity, jury composition, survey research, jury selection procedure, the use of peremptory challenges and strike procedures. They have been qualified as expert witnesses in numerous federal and state courts.

The NJP has authored three texts, *Jurywork: Systematic Techniques* (2nd edition 1983, with annual updates through 2002); *Women's Self-Defense Cases: Theory and Practice* (1981); and *The Jury System: New Methods for Reducing Prejudice* (1975). Members of the NJP have written numerous articles for legal

and social science journals on subjects related to voir dire and the jury selection process. NJP members are frequent speakers at training seminars for judges and criminal and civil attorneys throughout the United States, including, *inter alia*, seminars conducted by the American Bar Association; National Association of Women Judges; Florida Conference of County Court Judges; State of New York Unified Court System Judicial Seminar; United States Department of Justice, Civil Rights Division; Practicing Law Institute; the American Trial Lawyers Association; Association of Business Trial Lawyers; California Attorneys for Criminal Justice; and National Association of Criminal Defense Lawyers.

NJP members have been invited to give testimony before Congressional committees and committees of numerous state legislatures.

NJP was cited with approval by Justice Thurgood Marshall, dissenting in *Mu' Min v. Commonwealth of Virginia*, 111 S. Ct. 1899 (1991), the California Supreme Court in *People v. Williams*, 29 Cal. 3d 392, 628 P.2d 869 (1981); and the Michigan Supreme Court in *People v. Tyburski*, 445 Mich. 606 at 623 (1994).

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## INTEREST OF *AMICUS*<sup>1</sup>

Consistent with the express purposes for which it was founded, *amicus* has an ongoing interest in studying, maintaining and strengthening all aspects of the American jury system. From its members' studies of the relevant fields of social science and their extensive work and observation in individual cases, the NJP has developed a broad understanding of how the conditions under which jurors are selected, in conjunction with the communities from which they are chosen, affect the behavior of individual jurors and their ability to serve as fair and impartial arbiters of fact. The circumstances surrounding the choice of venue and jury selection in the present case involve issues of community bias which have implications for both the defendant and the jury system as a whole. For this reason, *amicus* has a strong interest in the outcome of this case.

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## SUMMARY OF THE ARGUMENT

*Certiorari* is warranted to furnish guidance to trial courts across the country, federal and state, as to the circumstances under which a change of venue is

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<sup>1</sup> No person other than *amicus* and its counsel participated in the writing of this brief or made a financial contribution to the brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief.

appropriate. Several basic aspects of the law are ambiguous and will continue to vex lower courts until this Court provides clarification.

There is a conflict among the circuits as to the burden of proof faced by the proponent of a Rule 21 based venue change for presumed prejudice. Three substantially different standards are in use and were applied in the instant case by the courts below.

Additionally, there is ambiguity in regard to the role played by the source of the bias in assessing the need for a venue change. Historically, requests for venue change have been prompted by excessive pre-trial publicity. Whether an equivalent need for a venue change can arise from community attitudes, which are distinct from the publicity a case has generated, is an as yet unresolved issue.

Lastly, trial courts must recognize the limitations of voir dire as a mechanism for detecting bias on the part of jurors. The unreliability of voir dire responses as a measure of juror bias has now been well documented by social science research. Until trial courts recognize this, they will rely too much on voir dire as an effective prophylactic device for insuring a fair trial and avoiding the need for a venue change.

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## ARGUMENT

**CERTIORARI IS WARRANTED TO FURNISH GUIDANCE TO FEDERAL TRIAL COURTS ACROSS THE COUNTRY AS TO THE CIRCUMSTANCES UNDER WHICH A VENUE CHANGE IS APPROPRIATE**

**I. THE BURDEN OF PROOF FOR A RULE 21 CHANGE OF VENUE BASED ON PRESUMED PREJUDICE IS IN NEED OF CLARIFICATION**

This is a case in which the courts have to date imposed three substantially different standards as to the burden of proof defendants faced in their effort to have venue changed intra-district, from Miami to Fort Lauderdale, for presumed prejudice under Rule 21(a). The first is that adopted by the District Court below, which requires a level of bias which would render virtually impossible a fair trial (hereafter, the "virtual impossibility" standard). The second is the one adopted in the 11th Circuit *en banc* opinion below which requires a reasonable certainty that prejudice prevents the defendant from receiving a fair trial (the "reasonable certainty" standard). The third, adopted by the dissent to the *en banc* opinion, focuses on the probability or likelihood that a defendant cannot receive a fair and impartial trial (the "probability of unfairness" standard).

This conflict among standards echos that which exists between the federal circuits, as well as that which exists between the various state courts which

have addressed the issue of the constitutionally-mandated standard. It also echoes the uncertainty which *amicus* has encountered over the years on the part of trial courts across the country, federal and state, as to the appropriate burden of proof for venue change motions.

*Amicus* submits that the time is now ripe for a resolution of this conflict. With the revolution in technology which permits information to be disseminated more broadly and more rapidly than ever before, we are entering a period where there will be more rather than fewer requests for venue change. The 24 hour news cycle encompasses an endless chain of events. Amateur video footage of violent interactions between police officers and civilians, for example, like those that sparked civil unrest and ultimately led to the controversy about the appropriate venue in the Rodney King case, is becoming more commonplace.<sup>2</sup> The same applies to video footage of suspicious activity leading to an arrest, taken from a camera mounted on a police vehicle.

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<sup>2</sup> As this brief was being written, Oakland, California, was being rocked by street demonstrations protesting the killing – captured by bystanders with cell phone cameras and transmitted worldwide via the internet – of an unarmed and apparently fully subdued black man by a white Transit District police officer. At the same news conference that he announced filing of murder charges against the officer, the District Attorney stated that he “would fight any defense effort to move the case out of Alameda County.” (San Francisco Chronicle, January 15, 2009, pp.A-1 and A-12.)



Furthermore, the fact that the publicity reaches a wider audience than was previously the case does not undermine the practical benefits that a change in venue can achieve: no matter how widely disseminated news of an event becomes, there is still a meaningful difference in the way those closest in proximity to an event experience it in comparison to those further removed. (For further on this, see Section II, *infra*.) Accordingly, trial courts across the country are in need of guidance only this Court can provide.

## II. THE ROLE THAT IS PLAYED BY THE SOURCE OF THE BIAS IN ASSESSING THE NEED FOR A VENUE CHANGE IS IN NEED OF CLARIFICATION

### A. Publicity-Based Bias

This court's change of venue jurisprudence was developed largely through cases of high levels of pre-trial publicity which were ultimately found to be incompatible with the right to a fair trial. Thus, in a line of notable cases, criminal convictions were reversed where publicity had reached a point which was later described by this court as "an atmosphere that had been utterly corrupted by press coverage." *Murphy v. Florida*, 421 U.S. 794, 798 (1975). See, e.g., *Irwin v. Dowd*, 366 U.S. 717, 725-727 (1961) (publicity of, *inter alia*, defendant's confession to six murders, offer to plead guilty, crimes committed as juvenile, and the like "blanketed" the county); *Rideau v. Louisiana*, 373 U.S. 723, 724 (1963) (repeated broadcasts

of defendant's confession rendered trial nothing more than "a hollow formality" (726-727); (*Estes v. Texas*, 381 U.S. 532, 536, 550 (1965) ("cables and wires were snaked across courtroom floor, three microphones were on the judge's bench and others beamed at the jury box and the counsel table"). *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (trial took place in a "carnival like atmosphere" against a background of extensive and inflammatory publicity).

In the wake of these landmark rulings, trial courts faced with intense barrages of publicity, often national in scale but most acute in the area most affected by the events, have been more prepared to grant requests for change of venue. Thus, in the *Angela Davis* case, the internationally known political activist was accused and ultimately acquitted of providing a gun to Jonathan Jackson, which was used in a shooting in the Marin County Courthouse, killing a judge and paralyzing a prosecutor, the case was transferred to another county for trial. *People v. Davis*, Marin County Superior Court No. 3744 (1971). In the Attica prison cases, defendants were granted a change of venue from rural Wyoming County in upstate New York, the crucial factor being that one in five potential jurors had a connection with the prison or state troopers involved in the retaking of the prison. *People v. Attica Brothers*, 359 N.Y.S. 2d 699, 79 Misc. 2d 492 (Sup. Ct. Erie County, 1973). In the Richard Allen Davis case, the man accused and ultimately convicted of the kidnap and murder of Polly Klaas (the case which led to adoption of

California's three strikes law), received national coverage and was transferred to another county for trial. *People v. Davis*, Santa Rosa County Superior Court No. 21720 (1995).

In the Washington DC sniper case, the trial court observed:

"that venue should be transferred to a jurisdiction outside the Washington-Richmond corridor, where many citizens lived in fear during the month of October 2002 as a result of the crimes with which the defendant is charged."

*Commonwealth v. Malvo*, Criminal No. 102888, Fairfax Cty. Cir. Ct. (July 2, 2003). In Virginia, the trial court reasoned that moving the trial to a county outside the locus of the crimes, barely 100 miles away, nonetheless provided a jury pool that was not permeated with the fear and personal identification with victimhood that existed in Beltway communities.

In the cases cited above, as in the Oklahoma City bombing trial, the change of venue did not result in obtaining a jury free of any knowledge of the case (in this age of mass communication that would likely be both impossible and undesirable). Rather, the change was designed to prevent the facts of the case from being over-shadowed, if not overwhelmed, by the social and political context unique to the original venue. *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. Okla. 1996) (the Oklahoma City bombing case).

### **B. Community-Attitudes-Based Bias**

The present case, on the other hand, although not apparently the subject of the same kind of intense case specific pre-trial publicity that prompted the landmark rulings previously alluded to (p.6, *supra*), did arise in the context of intense and long enduring anti-Castro sentiment documented in the newspaper articles submitted by the defense. The strong feelings and animosity reflected in such data are understandably the result of the personal experiences of Cuban American refugees, who have become an integral part of the community and the dominant ethnic group in Miami-Dade. Unlike most other parts of the country where small populations of refugees have settled in insular communities often described as ethnic ghettos, and whose acceptance into the wider community and the political structure takes generations, the Cuban presence in Miami-Dade has become a dominant one in commerce, politics and daily life, affecting Cuban and non-Cuban residents alike.

Non-Cubans in Miami-Dade have been exposed to far more anti-Castro sentiments than non-Cubans living in other parts of Florida, and certainly in other parts of the United States. Likewise they have also been exposed to an enduring campaign to oust Castro from power, and almost contemporaneously with this trial, the events related to Elian Gonzalez. This atmosphere seems to be the very thing the Court addressed in *Pamplin v. Mason*, 364 F.2d 1, 11 (5th Cir. 1968) when it stated:

Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

A similar situation arose in a state court case in California, *People v. Croy*, Superior Court, Placer County, No. 52587 (1987), involving a Native American defendant charged with killing a Caucasian police officer, which resulted in a change of venue. There the Court observed:

This is simply to say, that absent other factors the existence of residual bias does not alone provide sufficient basis for change of venue. What the potential for bias from preconceived notion about Native Americans in Placer County does do, is potentiate the otherwise "low level" factors indicating the need for change of venue . . .

See also, *United States v. Means*, 409 F. Supp. 115 (D.N.D. 1976) (venue changed based on findings indicating strong community prejudice against Native Americans in general and the American Indian Movement in particular).

In the experience of *amicus*, bias based on what the dissent to the 11th Circuit's *en banc* opinion calls "prejudice within the community," or what also might be referred to as "community attitudes" (i.e., attitudes which pre-exist any pertinent adverse publicity), can be at least as incompatible with the right to a fair

trial as bias stemming from case related pre-trial publicity.

And, from the record below, it appears there is reason to be concerned that the widespread hostility toward the Cuban government among residents of Miami-Dade could and did impact jurors. Non-Cuban jurors were likely to be aware that this case would be of significance to the Cuban community in Miami-Dade; that it would be closely followed, especially in the wake of the Elian Gonzalez affair; and that the Cuban community could react to a verdict perceived to be adverse to their interests. In this context, whether or not individual jurors harbored anti-Castro sentiments, they are well aware that the surrounding community did, which causes us to question whether a fair and impartial jury could be impaneled in the Miami-Dade community.

### **C. The Fear Factor as a Source of Bias**

Any attempt to categorize the sources of bias that come into play in the case law regarding change of venue would be incomplete if consideration were not given to another powerful factor that may accompany publicity-based bias or community attitude based bias in any given case. This is the corrosive effect that fear on the part of jurors can have on the fairness of a trial. And, it includes not only fear for one's physical safety or that of one's family, but fear for one's economic livelihood or even for preserving one's network of social relationships. Whether this phenomenon is



characterized as “fear,” or merely “concern,” it presents a danger if it reaches a point when a juror feels that he/she would feel uncomfortable around friends, neighbors, colleagues, or others if they knew how he/she voted in regard to guilt.

In our view, the situation that defendants faced on the eve of trial in the present case has many, if not all, of the indicia that have historically prompted fear on the part of jurors. The Elian Gonzalez affair had stoked the flames of resentment on the part of the Miami-Dade community against Castro and his government to the point where demonstrations and mass protests were taking place in the streets.<sup>3</sup> One prospective juror had concerns about community reaction to a verdict because she did not “want rioting and stuff to happen like what happened with the Elian case.” (R26 at 938, 945.) Another referred to the “mob mentality” that surrounded the Elian Gonzalez matter. (R27 at 1118-28, 1175-77.)

The climate of fear was palpable. At least one prospective juror admitted to fearing for his physical safety. (R25 at 782, 789.) Another confessed to concern about the impact that sitting on the jury would have for his business, which was dependent on the good will of the community. (R26 at 1059, 1073.) And when during the trial a prominent member of the

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<sup>3</sup> R59 at 6096-108, 6145-49 (protestors carried signs stating “take Castro down” and “spies to be killed.” *Id.* at 6145); R26 at 938, 945; R3-397, Exs.; R4-483, Exs.; R4-498, Exs.



exile community who was testifying as a witness referred to a defense lawyer as doing the work of the Castro government (R81 at 8944-45), the jury members that sat on the case had to be concerned about having their own loyalty to the United States questioned if they failed to convict.

Nor was the impact of public demonstrations and protests on the mood of the public confined to the Cuban-American population; the entire community was affected. One non-Cuban prospective juror was concerned about returning a not guilty verdict because he would face "personal criticism" and media coverage and because he had concerns for what might happen after a verdict was returned. (R26 at 1021-28, 1030, 1032.) Another, referring to community sentiment which he said, stoked by publicity, could become quite volatile, stated it would be difficult to follow the court's instruction not to expose oneself to information about the case. (R26 at 1011-13, 1018-19.)

In recognition of the climate of fear that surrounded the trial, the district court tried to insulate jurors from the glare of media scrutiny. But apparently to little or no avail. On the first day of voir dire, after learning that prospective jurors were exposed to a press conference held by the victims' families on the courthouse steps and that some jurors were approached by members of the press, the district court addressed the subject of isolating the jurors (R22 at 111-16; R62 at 6575-76), and instituted protections, including instructing marshals to accompany the jurors as they left the building, sealing the voir dire

questions (R7-078 at 2-3, 7; R21 at 111-113, 117-119; R22 at 115, 119), and limiting the sketching of witnesses for their protection. (R9-1126). When later on in the trial some of the jurors nonetheless indicated they felt pressured, the court again modified the jurors' transportation and entry and exit from the courthouse. But during deliberations jurors were again filmed entering and leaving the courthouse all the way to their cars (R126 at 14643-46). One has to wonder whether at this point the district court recognized the futility of trying to protect the integrity of the trial process without a change of venue.

#### **D. The Interplay Among Factors as a Source of Bias**

A distinctive feature of the instant case is the manner in which various sources of bias (community attitudes, publicity, fear, and miscellaneous other factors) combined to form what the 11th Circuit dissent referred to as a "perfect storm." (Pet. App. 316a.) Thus, charges of committing espionage on behalf of the Cuban government were heard by a jury drawn from a community which had as a dominant value a four decade long history of virulent anti-Castro sentiment. This was a sentiment which, but for the publicity about the BTTR shutdown and Elian Gonzales controversy which continued through the trial, might otherwise have diminished in intensity over time. Instead, publicity appears to have exacerbated the prejudice that was already inherent to this unique situation. If that were not enough, the

toxic atmosphere surrounding the trial gave jurors concern about their physical safety and livelihood. This in turn played into the government's arguments regarding the evils of Cuba and the threats it posed to American values.

This case provides an occasion for this court to affirm the importance for trial courts to afford consideration to all relevant factors, including their interplay with one another, in assessing the need for a change of venue. At least one state Supreme Court employs such a multi-factored approach to motions for venue change.<sup>4</sup>

### **III. IT IS ESSENTIAL THAT COURTS RECOGNIZE THE LIMITATIONS OF VOIR DIRE AS A MECHANISM FOR DETECTING JUROR BIAS**

A thorough voir dire is often assumed to be the best remedy for bias, if not the best assessment of the nature and extent of prejudice, which may exist in the venire. However, there are inherent limitations to

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<sup>4</sup> The California Supreme Court has identified a number of factors other than publicity which support a presumption that potential jurors are biased. These factors include the nature and gravity of the offense, size of the community, length of time the accused has been in the community, reputation of the victim's family, and notoriety the charged crime would naturally create. See, *Frazier v. Superior Court*, 5 Cal. 3d 287 (1971) (community's esteem for victims and its extreme hostility and mistrust of "hippies" such as the defendant); *Fain v. Superior Court*, 2 Cal. 3d 46 (1969); *Maine v. Superior Court*, 68 Cal. 2d 375 (1969).

what voir dire can achieve as an effective mechanism for rooting out bias. As Chief Justice Marshall observed two centuries ago, protestations of neutrality by a juror are not to be trusted:

He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him . . . He will listen with more favor to that testimony which confirms, than that which would change his opinion.

*United States v. Burr*, 25 Fed. Case 49 (case #14, 692g, 1807). The skepticism with which courts have viewed jurors' self assessments of fairness, particularly in controversial and high publicity cases, is traceable to several dynamics which necessarily come into play in the course of voir dire, as discussed below.

### A. The Problem of Unconscious Bias

In the Oklahoma City bombing trial, Judge Matsch asserted that the existence of prejudice is not easy to prove, in part because "it may go unrecognized in those who are affected by it." *United States v. McVeigh*, *supra*, 918 F. Supp. 1467, 1472. Likewise, Justice Breyer has noted: "[s]ubtle forms of bias are automatic, unconscious and unintentional' and 'escape notice, even the notice of those enacting the bias.'"<sup>5</sup>

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<sup>5</sup> *Miller-El v. Dretke*, 545 U.S. 231, 286 (2005) (Breyer, J., concurring) (quoting Antony Page, *Batson's Blind Spot*:  
(Continued on following page)

These statements are consistent with psychological research on jurors and, indeed, on many other cases of human behavior.<sup>6</sup> They are also consistent with recent scholarship and research on the role of unconscious bias in the context of hiring and employment, health, housing, and education, among more.<sup>7</sup> Although Judge Matsch's remarks occurred in the context of the Oklahoma City bombing, they are equally applicable to a trial of Cuban agents in the climate of anti-Castro sentiment in Miami-Dade.

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Unconscious Stereotyping and the Peremptory Challenge, 85 B.U.L. Rev. 155, 161 (2005)).

<sup>6</sup> See Vidmar, Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation, 26 LAW AND HUMAN BEHAVIOR 73 (2002); Nesbitt and Wilson, Telling More Than We Can Know: Verbal Reports on Mental Process, 84 PSYCHOLOGICAL REVIEW 231 (1977).

<sup>7</sup> See, e.g. Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination And Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999); Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, The Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008); Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (giving an overview of new research in cognitive social psychology).

## **B. The Problem of Socially Desirable Responses**

Some prospective jurors who hold biases are likely to state that they can be impartial solely because their answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call "acquiescence" or "socially desirable" responses. The tendency to provide such answers can be enhanced by the authority presence of the judge and is heightened when the voir dire examination is conducted by the Court.<sup>8</sup> Jurors perceive the authority of the Court and implicit message that to be "good" citizens they must say they can set aside their biases and prejudices, without knowing whether they are truly capable of doing so, and follow the law. Unfortunately such blanket assertions are often naive and hollow.

## **C. The Problem of Normative Pressures**

Judge Matsch's observations in the Oklahoma City bombing trial are instructive in more than one respect. He also said that the existence of prejudice "has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative behavior." *United States v. McVeigh, supra*, 918 F. Supp. at 1473. Social science research on the

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<sup>8</sup> Jones, S., *Judges-versus Attorney-Conducted Voir Dire: An Empirical Investigation on Juror Candor*, 11 Law & Hum. Behav. 131, 143 (1987).

psychology of jurors also confirms this aspect of legal reasoning.

Jurors do not approach the trial as empty receptacles who passively listen to the evidence and decide cases independently of their past experience, knowledge and awareness of community norms. Numerous studies have shown that jurors draw upon their prior understandings of the world as they evaluate and make sense of the evidence presented at trial.<sup>9</sup> They do not simply store and record evidence. Rather, they actively select and organize it around pre-existing social schemas to construct "stories" about the events in dispute. They fill in gaps in the evidence with inferences about how the world works. These processes include assumptions about important past events, inferences about human character, and the motivations of the parties involved.

Research evidence suggests that events that cause strong emotions<sup>10</sup> or threaten people's cultural

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<sup>9</sup> See, e.g., Pennington and Hastie, explaining the Evidence: Tests of the Story Model for Juror Decision Making, 62 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 189 (1982); Holstein, Juror's Interpretation and Jury Decision Making, 9 *LAW AND HUMAN BEHAVIOR* 83 (1985); Casper et al., Juror Decision Making, Attitudes and Hindsight Bias, 13 *LAW AND HUMAN BEHAVIOR* 291 (1989); Smith and Studebaker, What Do You Expect?: The Effect of People's Knowledge of Crime Categories on Fact Finding, 20 *LAW AND HUMAN BEHAVIOR* 517 (1996).

<sup>10</sup> See, e.g., Fishfader et al., Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention and

(Continued on following page)



world view affect the way these schemas operate.<sup>11</sup> The sources of this knowledge, information and attitudes may come from pre-existing dispositions, from mass media, or from other persons in the juror's social environment through means of gossip and rumor.<sup>12</sup> In ordinary cases the gossip and rumor may be absent, but in high-profile cases, members of the community frequently discuss the events and make normative statements about their meaning and about the proper outcome of the trial.

This dynamic has, of course, particular applicability to the climate of anti-Castro government bias

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Level of Emotionality, 20 *LAW AND HUMAN BEHAVIOR* 565 (1966); Kramer et al., Pretrial Publicity, Judicial Remedies and Jury Bias 14 *LAW AND HUMAN BEHAVIOR* 409 (1990); Ogloff and Vidmar, The Impact of Pretrial Publicity on Jurors: A Study to Compare the Effects of Television and Print Media in a Child Sex Abuse Case, 18 *LAW AND HUMAN BEHAVIOR* 507 (1994).

<sup>11</sup> See, e.g., Greenberg et al., Terror Management Theory of Self Esteem and Cultural World Views: Empirical Assessments and Conceptual Refinements, in Mark Zanna, Ed., *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY*, Vol. 29, 61 (1997); Greenberg et al., Evidence for Terror Management Theory II: The Effects of Mortality Salience on Those Who Threaten or Bolster the Cultural World View, 58 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 308 (1990); Miller et al., Accounting for Evil and Cruelty: Is it to Explain or Condone?, 3 *PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW* 254 (1999).

<sup>12</sup> See Vidmar, Retributive Justice: Its Social Contest, in Michael Ross and Dale T. Miller, Eds., *THE JUSTICE MOTIVE IN EVERYDAY LIFE* (2001).

that permeated the Miami-Dade community in the wake of the Elian Gonzalez affair. That such a climate was the normative view in the community at that time and place seems incontestable. And to expect that this climate did not invade the jury room during deliberations on the fate of persons accused of acting as Cuban espionage agents is to stretch the limit of one's imagination.

#### **D. The General Problem of the Unreliability of Jurors' Voir Dire Responses**

Limitations on the reliability of voir dire as a mechanism for assessing bias in jurors are not always traceable to specific phenomena such as unconscious bias, socially-desirable responses, or normative pressures. In a recent article Judge Gregory Mize described research on jurors in felony trials who had been asked up to eighteen questions during voir dire.<sup>13</sup> Then, in a separate room he informally interviewed jurors who had heard the questions but had not responded to them during group voir dire. While some didn't understand the questions and others were just resentful at being called for jury duty, still others revealed biases strongly favorable to the defense or prosecution. Thus, the jurors' responses to earlier voir dire questioning were clearly unreliable.

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<sup>13</sup> Mize, On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter The Jury Room, 36 COURT REVIEW 10 (1999).

Judge Mize's findings in this regard are consistent with a considerable body of other research on voir dire.<sup>14</sup>

In short, social science research confirms what many judges have long suspected: for various reasons, voir dire is an inherently imperfect device for detecting bias on the part of jurors. In the experience of *amicus*, this is particularly true in high profile

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<sup>14</sup> See, e.g., Edward Bronson, THE EFFECTIVENESS OF VOIR DIRE IN DISCOVERING PREJUDICE IN HIGH PUBLICITY CASES: AN ARCHIVAL STUDY OF THE MINIMIZATION EFFECT (1989); Broeder, Voir Dire Examinations: An empirical Study, 38 Southern Law Review 503 (1965); Kerr et al., On the Effectiveness of Voir Dire in Criminal Cases With Prejudicial Pre-trial Publicity: An Empirical Study 40 AMERICAN UNIVERSITY LAW REVIEW 665 (1991); Kramer et al., Pre-trial Publicity Judicial Remedies and Jury Bias, 14 LAW AND HUMAN BEHAVIOR 409 (1990); Marshall and Smith, The Effects of Demand Characteristics, Evaluation Anxiety and Expectancy on Juror Honesty During Voir Dire, 120 THE JOURNAL OF PSYCHOLOGY 205 (1986); Seltzer, et al., Juror Honesty During the Voir Dire, 19 JOURNAL OF CRIMINAL JUSTICE 451 (1991); Horowitz, Juror Selection: A Comparison of Two methods in Several Criminal Cases, 10 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 86 (1980); Diamond, Scientific Jury Selection: What Social Scientists Know and Do Not Know, 73 JUDICATURE 178 (1990); Zeisel and Diamond, The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, 30 STANFORD LAW REVIEW 491(1978); Neil Kressel and Dorit Kressel, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING (2002); Moran et al., Jury Selection in Major Controlled Substance Trials: The Need For Extended Voir Dire, 3 FORENSIC REPORTS 331 (1990); MICHAEL SAKS AND REID HASTIE, SOCIAL PSYCHOLOGY IN COURT, 66-71 (1978).

cases where the impartiality of the local jury pool has been called into question. For this reason, *amicus* is skeptical, despite the extensive voir dire conducted by the District Court in this case, that it was possible for defendants who were on trial for being Cuban spies to receive a fair trial in the Miami-Dade community.

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◆

### CONCLUSION

For the foregoing reasons, *certiorari* should be granted.

Respectfully submitted,

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In The Supreme Court of the United States

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO  
GUERRERO, GERARDO HERNANDEZ, AND LUIS MEDINA,  
*Petitioners,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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BRIEF OF *AMICI CURIAE* NATIONAL LAWYERS  
GUILD AND NATIONAL CONFERENCE OF  
BLACK LAWYERS IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for the protection of rights granted by the United States Constitution and fundamental principles of human and civil rights. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles. As one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, its members helped draft the Universal Declaration of Human Rights and in 1948 founded one of the first non-governmental organizations to be granted observer status in the United Nations, the International Association of Democratic Lawyers. The Guild has participated in the major social justice movements in the twentieth century, including racial discrimination in such cases as *Hansberry v. Lee*, 311 U.S. 32 (1940), which struck down segregationist Jim Crow laws in Chicago. As in this case, the Guild has long fought to ensure defendants a fair forum, with our members filing the first post-Reconstruction actions using the removal process in prosecutions that threatened the

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<sup>1</sup> Pursuant to Rule 37, counsel for all parties received timely notice of the intent to file this brief. Consent from counsel for Petitioners to the filing of all *amicus curiae* briefs is on file with the Court. A letter from Counsel for Respondent consenting to the filing of this brief is on file with the Court. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution for the preparation or submission of this brief.

civil rights of minority activists. See *Baines v. City of Danville*, 321 F.2d 643 (4th Cir. 1963), *aff'd* 384 U.S. 890 (1966) (over dissents from Chief Justice Warren and Justices Douglas, Brennan and Fortas, as stated in *City of Greenwood v. Peacock*, 384 U.S. 808, 835 (1966)). The efforts of National Lawyers Guild members were instrumental in successfully halting discriminatory and retaliatory state court criminal proceedings against civil rights activists in the South. *Dombrowski v. Pister*, 380 U.S. 479 (1965).

The National Conference of Black Lawyers (NCBL) was established in 1968. It is an association of lawyers, law professors, law students, legal activists and others whose mission is to serve as the legal arm of the movement for Black liberation, to protect human rights, to achieve self-determination of Africa and communities in the African Diaspora and to work in coalition to assist in ending oppression of all peoples. *Amicus* NCBL's interest in the instant case is rooted in its longstanding commitment to both racial justice and the normalization of relations between Cuba and the United States of America. The organization has appeared before this honorable Court as *amicus curiae* in the past in cases that concerned race and the law -- most notably in the matter of *Grutter v. Bollinger*, 539 U.S. 306 (2003). Through the years, *Amicus* NCBL has given considerable attention to the issue of racial discrimination in legal proceedings, and the organization is well suited to offer insight and analysis concerning such issues in the case at bar.

*Amici* submit that their perspectives on the widespread implications of racial discrimination in

jury selection will be of value to the Court in evaluating the issues presented.

## SUMMARY OF ARGUMENT

*Amici* National Lawyers Guild and National Conference of Black Lawyers write to amplify an overarching issue in this case. Exploiting prejudices against a particular community in jury selection deeply offends the rights of criminal defendants and potential jurors. Moreover, any court's tolerance for race-based discrimination in the form of peremptory challenges to strike black venirepersons -- and the resulting concern that the judicial system is unable to root out this practice so long as it remains at a "moderated" level -- undermines the integrity of the legal system and the appearance of justice.

In this case, the court of appeals held that the prosecution evaded what in most circuits would be the *prima facie*-level inquiry of defendants' rights under *Batson v. Kentucky* merely by not using all of its strikes to eliminate each and every minority juror. *Batson v. Kentucky*, 476 U.S. 79 (1986). This represents a violation of the Equal Protection clause of the Fourteenth Amendment, and a somber threat to this Court's goal of eradicating racism and discrimination in our judicial system. At the heart of *Batson* is the principle that the burden of establishing a *prima facie* case cannot be onerous one. This Court has reaffirmed that tenet in recent years, and the other circuits acknowledge and adhere to a less burdensome standard than was applied by the Eleventh Circuit here. This case presents the Court with an opportunity to respond

directly to the concerns of Justice Marshall, who even in *Batson* warned that, without stringent review, prosecutors would be "left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level." *Id.* at 105.

This case presents an important test for our judiciary: whether foreign citizens with unpopular views can get a fair trial in our system. While issues of venue and whether pro-Cuba defendants should have been tried in Miami are addressed in the Petition, for purposes of this brief it is important to note that racist assumptions about how African Americans think and what their social influences are may have been at play, and certainly give the appearance of having been at play. As discussed in Part IV(A), *infra*, there is a prevailing prejudiced assumption that African Americans are apart from the Cuban American community and relatively accepting of Fidel Castro, and the disparate exclusion of blacks from the jury against such a background adds an appearance of injustice to what is already a *prima facie* case of racial discrimination.

This Court has the opportunity to re-establish public confidence in our system of justice, confidence that has been diminished in part by the prosecution's use of two-thirds, or seven of its eleven peremptory challenges, to strike black members of the venire in Miami-Dade County, where blacks comprise 21% of the population. In so doing, the Court will restore the all-important appearance of justice to this case. *Amici* urge the Court to grant certiorari and ultimately to grant petitioners relief.

## ARGUMENT

### I. INTRODUCTION

This case represents a retrogression from the Court's commitment to freeing the justice system of its remaining vestiges of racism. While opposition to the Cuban government is famously widespread and predominant in southern Florida, the African American community is perceived as being insulated from the Cuban American community and such views. See Part IV(A), *infra*. Consistent with this prejudice about African Americans' influences and opinions, this case saw an extraordinary use of peremptory challenges against African American venirepersons. In addition to denying prospective jurors the privilege of fully participating in the administration of justice, the end result is the denial of a fair trial for the defendants.<sup>2</sup> A further, overarching consequence is the perception by the general public that the criminal justice system is unjust and unfair.

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<sup>2</sup> Given what the United Nations Working Group on Arbitrary Detentions deemed "the climate of bias and prejudice against the accused in Miami [which] persisted and helped to present the accused as guilty from the beginning," the added injustice of preventing a cross-representative jury, and thus ensuring a fair trial, is particularly grave. Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc.E/CN.4/2006/7/Add.1



## II. THIS COURT MUST TAKE AN ACTIVE ROLE IN ELIMINATING RACISM

As early as 1880, Justice William Strong reaffirmed that the Fourteenth Amendment was created to ensure that blacks were guaranteed the same civil rights as whites, and that blacks cannot be excluded from jury service on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303 (1880). However, the Court made the burden of proof so stringent that the pattern of excluding black jurors persisted. *Swain v. Alabama*, 380 U.S. 202 (1965). Nobel Laureate Karl Gunnar Myrdal documented disparate treatment of African Americans in the Southern courts, writing in his 1944 study that the entire judicial system was "overripe for fundamental reforms." Karl Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, 555. In 1986 the Court replaced the insurmountable test articulated in *Swain* with a less onerous three-part procedure to establish the existence of discrimination in the exercise of peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79 (1986).

Despite these efforts, African Americans continue to bear the brunt of inequalities in all aspects of the justice system, including jury selection. Mark Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* (1990). Still today, the promise of *Batson v. Kentucky* to attain representative juries remains elusive in practice. John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 Vt. L. Rev. 297 (2005) (surveying ongoing difficulties in eliminating racism



in jury selection); Cassia C. Spohn, *Courts, Sentences, and Prisons* 124 Daedalus 119 (1995) (reviewing cases decided in the first decade under *Batson*). Given the entrenched difficulties of realizing reform through *Batson*, the justice system must be ever vigilant in ensuring an adherence to bias-free jury representation.

This Court has repeatedly expressed its intolerance of racial discrimination in the use of peremptory challenges to keep blacks off juries. In its determination to eradicate remaining, reviled fixtures of bias, its decisions over the past several years indicate that the right to a jury free from bias is a right that needs to be constantly monitored, with courts looking beyond prosecutors' race-neutral proffers. *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005).

It is not enough to accept the prosecution's proffered race-neutral reasons for exercising peremptory challenges. "The right to a jury free of discriminatory taint is constitutionally protected . . . . The right to use peremptory challenges is not," wrote Justice Breyer in *Miller-El v. Dretke*. *Miller-El*, 545 U.S. at 273. Prosecutorial discretion is undisputedly a determinative factor in the outcome of cases. Note, *Judging the Prosecution*, 119 Harvard Law Review 2121, 2122 (2006).

Prosecutorial peremptory challenges generally effect systemic harm by making it more likely than not that mostly white juries will convict minority defendants. "The increased certainty of conviction attending reliance on such juries gives prosecutors tremendous power over defendants, leading ... to

unfair convictions . . . . [T]he real power of the cross-representative petit jury is its potential to constrain the exercise of prosecutorial discretion in a way that courts and others cannot." *Judging the Prosecution*, 119 Harv. L. Rev. at 2137.

In this case, the trial court acknowledged a host of factors related to external pressures to influence jury selection. On the first day of jury selection, the families of anti-Castro victims held a press conference, whose presence en masse during *voir dire* clearly revealed an intention to influence jury selection; and although this was noted by the trial court (Vol. 1:111), it did not result in any meaningful attempt to cure or reduce its impact on the jury.

### III. STATING A *PRIMA FACIE* CASE UNDER *BATSON V. KENTUCKY* IS NOT BURDENSOME

Despite the elusiveness of a real end to racism in jury selection even post-*Batson*, a genuine and sincere effort to maintain a commitment to its underlying goal must be preserved. The requirements for stating a *prima facie* case under *Batson* are not and should not be onerous.<sup>3</sup> The first

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<sup>3</sup> The defendant must show that he is a member of a cognizable racial group, that the prosecution has exercised peremptory challenges to strike from the jury venire members of the defendant's race, and that these facts and other relevant circumstances raise an inference that the prosecutor used the strikes to exclude venirepersons on the basis of their race. *Batson v. Kentucky*, 476 U.S. at 96 (1986). (Whether or not the defendant was of the same race as the excluded venireperson was deemed irrelevant a few years later. *Powers v. Ohio*, 499 U.S. 400 (1990).)

step is not to be so burdensome that a defendant has to persuade the judge, on the basis of all the facts, some of which the defendant-objector can never know with certainty, that the challenge was more likely than not the result of purposeful discrimination. Rather, as this Court held in 2005, "a defendant satisfies the requirements of *Batson* by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162 (2005). The Circuits, and this Court, employ this modest "inferential" standard for setting the threshold requirements.

Justice Stevens, writing for the majority in *Johnson v. California*, said that the California Supreme Court had made it too difficult for defendants to set forth a *prima facie* claim of bias in jury selection. *Id.* The California Supreme Court had required a "more likely than not" standard to launch a *Batson* inquiry. Justice Stevens said the "overriding interest in eradicating discrimination" requires state courts to adopt standards that make it easier for *Batson* claims to be tested, rather than being excluded at the outset. *Id.* at 172.

The Eleventh Circuit's holding that no *Batson* inquiry is required when even one juror in a protected class is seated by a party that does not use all of its peremptory strikes is diametrically opposed to the fundamental principle that race-based exclusion from a jury of even one person violates the Fourteenth Amendment. In addition to conflicts with this principle, the Eleventh Circuit's decision is inconsistent with the other Circuits and with at least one previous decision of this Court.

### A. *Prima facie* Burden “Not Onerous” in the Circuit Courts

As the circuits have consistently recognized,<sup>4</sup> an overly burdensome *prima facie* test would result in a

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<sup>4</sup> The First Circuit has held that the *prima facie* burden is “not onerous” and requires only “circumstances sufficient . . . to raise an inference” of discrimination. *United States v. Escobar-de Jesus*, 187 F.3d 148, 164-65 (1st Cir. 1999). In the Second Circuit, the burden is “minimal” to demonstrate “circumstances surrounding the peremptory challenges raise an inference of discrimination.” *Overton v. Newton*, 295 F.3d 270, 277, 279n.10 (2d Cir. 2002). The Third Circuit requires “circumstantial evidence tending to support” an inference of discrimination. *Johnson v. Love*, 40 F.3d 658, 665-66 (3d Cir. 1994).

In the Fourth Circuit the initial burden raises “at least an inference” that the prosecution has used its strikes to eliminate jurors based on race. *United States v. Grimmond*, 137 F. 3d 823, 834 (4<sup>th</sup> Cir. 1998). The Fifth Circuit also applies the “raise an inference.” The integrity of the jury is a centrally important element in the achievement of a fair trial. The judiciary is obligated to “satisfy the appearance of justice” by conducting *voir dire* in a manner which minimizes the impact of racial, ethnic or other improper bias on the jury. *Batson v. Kentucky*, 476 U.S. 79, 90 (1986); *Turner v. Murray*, 476 U.S. 28, 35-38 (1986); *Rose v. Clark*, 478 U.S. 579, 587 (1986).

A *prima facie* case in the Seventh Circuit requires “facts and circumstances raising an inference that the potential jurors were excluded because of race.” *United States v. Cooper*, 19 F. 3d 1154, 1159 (7<sup>th</sup> Cir. 1994). The Eighth Circuit standard as is “circumstances that give rise to a reasonable inference of racial discrimination.” *United States v. Wolk*, 337 F.3d 997, 1007 (8<sup>th</sup> Cir. 2003) (quoting *Simmons v. Luebbers*, 299 F.3d 929, 941 (9<sup>th</sup> Cir. 2002)). The Sixth and Tenth Circuits have found a *prima facie* case in instances where the only member of a protected group in the venire was struck. *United States v. Mahan*, 190 F.3d 416, 424-25 (6<sup>th</sup> Cir. 1999); *Heno V. Sprint/United Mgmt. Co.*, 208 F.3d 847, 854 (10<sup>th</sup> Cir. 2000). *United States v. Joe*, 8 F.3d, 1488, 1499 (10<sup>th</sup> Cir. 1993).

retrogression to the *Swain* standard, which offered only dissembled criticism of racial discrimination in jury composition while making it nearly impossible to remedy.

In this case, the contrast between challenges to the percentage of blacks in the surrounding population is even greater than disparities found to either support or constitute a *prima facie* case of a *Batson* violation in cases in other circuits. See e.g. *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995) (disparity of 56% peremptory challenges to 30% African American venirepersons supports inference of discrimination); *United States v. Alvarado*, 923 F. 2d 253, 256 (2d Cir. 1991 (finding *prima facie* case where prosecution challenged 50% of minority venirepersons who represented 30% of pool). See also *Coulter v. Gilmore*, 155 F.3d 912, 919 (7th Cir. 1998) (ratio of 90% peremptory challenges to 29% minority venirepersons raises inference of discrimination); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993) (*prima facie* case of purposeful racially discriminatory use of peremptory challenges with ratio of 75% peremptories to 20% minority vernirepersons).

Here, the prosecutor's strike rate of 63.6% is in blatant disproportion to what one would expect from the racial composition of Miami Dade County, whose population at the time of the trial was 21% African-American.

Other courts, based on the facts at hand, would have found that the petitioners made a *prima facie* claim under *Batson*. Outside the Eleventh Circuit it is well settled that a rate of minority challenges

"significantly higher than the minority percentage of the venire would support a statistical inference of discrimination" and a *prima facie* case under *Batson*. *United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991).

Yet here, the Circuit refused to enter into the second and third steps of *Batson* and prevented the chance to adjudge if the peremptory strikes were genuine. As it stands, a strong perception exists that race was the determining factor in keeping blacks off the jury.

#### IV. SATISFYING THE "APPEARANCE OF JUSTICE"

The integrity of the jury and the selection process are centrally important elements in the achievement of a fair trial. The judiciary is obligated to "satisfy the appearance of justice" by conducting *voir dire* in a manner that minimizes the impact of racial, ethnic or other improper bias on jury selection. *Batson v. Kentucky*, 476 U.S. 79, 90 (1986); *Turner v. Murray*, 476 U.S. 28, 35-38 (1986); *Rose v. Clark*, 478 U.S. 579, 587 (1986). "Elements of *voir dire* continue to implicate greater societal rights." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). "*Voir dire* communicates to the people by satisfying the axiom that to perform its highest function in the best way must satisfy the appearance of justice." *Swain v. Alabama*, 380 U.S. 202 (1965).

This Court has recognized that the exclusion of blacks from juries undermines the integrity of the justice system. *Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992). Jury selection violations have an



impact on the integrity of the judicial system and on the appearance of justice.

A *per se* rule that peremptory strikes will not be reviewed so long as at least one African American escaped discriminatory exclusion does tremendous harm to the principles underlying *Batson* as well as the mechanisms for eradicating discrimination and providing a system that both is and appears just. As Professor Covey recently explained:

The Equal Protection Clause was intended "to put an end to governmental discrimination on account of race," and *Batson* advances that goal in three ways: it symbolizes official intolerance of discrimination in jury selection; it seeks to deter such discrimination; and it provides marginal incentives not to strike minority jurors and thereby enhances jury diversity. Of these functions, *Batson* probably has served the first most successfully. As a rhetorical device, *Batson* and its progeny have sent a strong message to the criminal justice system that discrimination in jury selection cannot and will not be tolerated. Indeed, the Court has stated that nowhere is the Fourteenth Amendment's command to eliminate official racial discrimination more compelling than in the judicial system; *Batson* was crafted specifically with this goal in mind. The constitutional command to root out discrimination has



been treated as so overriding that the Supreme Court repeatedly has stated that the exclusion of even a single juror on account of his or her race, ethnicity, or gender calls it into force. *Batson* was fashioned not only to prevent actual discrimination, but also to abolish perceived discrimination and to combat "cynicism" and a loss of "public confidence" in the criminal justice system.

Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 Md. L. Rev. 279, 316-17 (2007) (citations omitted).

If the rule here were allowed to stand, the judiciary will reasonably be seen as turning its back on the principle that even a single instance of discrimination must be exposed and rejected.

#### **A. An Appearance of Injustice Infects this Case**

Misrepresentations by the United States Attorney to the Court at this stage should be viewed in the same manner as misrepresentations to the jury at trial. When the impartiality and integrity of the jury is called into question, either by intentional misrepresentation by jurors or by failure of the Court to take sufficient measures to ensure its impartiality, *Clark v. United States*, 289 U.S. 1, 11 (1933), as occurred in this case, public confidence upon which the judicial process depends is

compromised in a manner that requires a new trial. "More is at stake then the rights of the petitioner; justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954).

The Eleventh Circuit acknowledged a host of factors designed to influence jury selection in this case, including the media and a range of influences from the anti-Castro movement in Miami. *Campa v. United States*, 459 F.3d 1121, 1136, 1152, 1161 (11th Cir. 2006) (noting incidents of jurors approached by the media, an article about the case, efforts to control media access, and a press conference on the courthouse grounds). The prosecutor's use of peremptory strikes to keep blacks from the jury must be considered in the larger context of the highly-charged extenuating circumstances.

In this case, peremptorily excluding African Americans from the jury at a rate three times greater than their population ratio fed into the racial biases concerning isolated and homogeneous demographic groups. As the Court will no doubt see briefed comprehensively elsewhere, the prosecutor would have had an interest in securing a largely Cuban American jury for these defendants who supported the Cuban government. The notion that the Cuban American community in South Florida is hostile to pro-Cuba causes is so pervasive as to warrant judicial notice, and was argued by the government in a case where such prejudices would have run against its interests. Def's Venue Mot., *Ramirez v. Ashcroft*, No. 01-CV-4835 (S.D. Fla. June 25, 2002). For purposes of this brief, it is important to note only that the African American community in southern Florida is perceived to be *uniquely* immune

from the anti-Cuba sentiment of the area. As explained immediately below, such a pro-prosecution prejudice would not have been assumed to exist among the African American community, so there would be an interest in excluding such jurors on the basis of their race.

The notion that there is a tension between the black population and the Cuban American community, especially over the government's approach to Cuba, is widespread and frequently emphasized in the mainstream press. As one sociologist noted:

Throughout the trajectory of the Elián [Gonzalez] spectacle, media coverage resulted in diverse afterimages of varying intensity. Among the two most prominent media afterimages were stories on child custody issues and stories on immigration policy. . . . The most common topics addressed in these stories were INS treatment of undocumented youth and U.S.-Haitian immigration policy -- facets of immigration policy rarely addressed by mainstream journalists. Whereas the newsworthiness of stories on INS treatment of undocumented youth resulted from the Elián newspeg, stories on U.S.-Haitian immigration policy also referenced a second newspeg: protests by Haitians living in Miami who objected to what they considered a double standard in the U.S. treatment of Haitian versus Cuban refugees.

Anne Teresa Demo, "The Afterimage: Immigration Policy After Elián," 10 *Rhetoric & Public Affairs* 27 (2007).

There is a general perception that the African American and Cuban American populations in South Florida are distinct and hold differing views of the Cuban government. Thus in the election after Elián Gonzalez was returned to Cuba by federal authorities, a single candidate was slandered contradictorily as both against the Cuban American population and too integrated with them, depending on the ethnic population of the audience. In Cuban American neighborhoods, he faced claims that he supported Janet Reno (under whose authority Elián Gonzalez was returned to Cuba), while in African American neighborhoods he was attacked with claims that he was using the case to cozy-up to the anti-Cuba electorate. See Dana Canedy, *Lawyer for Cuban Boy's Relatives Is Elected Miami Mayor*, N.Y. Times, Nov. 14, 2001, at A14 (describing these events and characterizing it as "vintage Miami politics" of playing off "deep divisions among racial and ethnic groups" in that city).

Tensions between the two communities received international attention when local and national black leaders called for a boycott of Miami after its Mayor and the Metro-Dade Commission refused to honor Nelson Mandela, under pressure from the Cuban American community there, which objected to Mr. Mandela's willingness to meet with Fidel Castro. See e.g. Arthur S. Hayes, "Black Groups Plan a Miami Boycott to Protest City's Treatment of Mandela," *Wall Street Journal*, Aug. 6, 1990, B6.

Going further, some anti-Cuba commentators assert that the African American population is disproportionately inclined to be open minded about Fidel Castro and perhaps even outrightly supportive of him. See e.g. Jay Nordlinger, "In Castro's Corner: A Story of Black and Red," *National Review* March 6, 2000, 40 (noting that pro-Castro statements have been common from highly regarded African American entertainers, including Danny Glover and Bill Cosby's wife, and political figures, including Sen. Charles Rangel who asked "Why should [Elián Gonzalez] stay here . . . just because 'we have some Cuban-American congressmen from Miami who are up for reelection?')").

Against such a backdrop, the disproportional exclusion of African Americans from a jury for pro-Cuba defendants more than raises an appearance of injustice. The refusal of the Eleventh Circuit to engage in even the standard *prima facie* review only magnifies the appearance of injustice, and leaves the system unable to determine whether these peremptory exclusions were motivated by the broad racial prejudices described above, in violation of *Batson*.

## CONCLUSION

It took this Court over a century to provide jurists with a test to help determine the properness of peremptory challenges. Social influences disfavorable to blacks no doubt intervened to slow this process after the Court's first enunciation in 1879 that the premise that exclusion of prospective

jurors based on race violated the Equal Protection clause of the Fourteenth Amendment. *Strauder*, 100 U.S. at 303. When the initial test in *Swain v. Alabama* proved too onerous for challengers, in 1986 this Court provided a more workable three-part test in *Batson v. Kentucky* aimed at putting an end to longstanding bias and discrimination in the United States courts of justice. *Batson*, 476 U.S. at 87; *Swain*, 380 U.S. at 202.

The Eleventh Circuit's decision in *Ruben Campa, Rene Gonzalez, Antonio Guerrero, Gerardo Hernandez, and Luis Medina, Petitioners, v. United States* is at odds with this Court's commitment to eradicating the taint of racial prejudice that has long infected judicial proceedings. Finding that the prosecution evaded a *prima facie* inquiry under *Batson* undermines the goals of *Batson* where, as here, the ratio of jurors excluded to the percentage in the surrounding community was consistent with the ratios in cases that warranted review in other Circuits. Given that the trial court acknowledged a host of external pressures to influence jury selection, the Circuit Court should have adhered to the spirit of *Batson* and questioned the prosecution's practice of excluding most of the African American venirepersons.

*Amici* ask this Court to grant certiorari in this case so that a fair trial might be had, restoring the rights of the defendants and the jurors while satisfying the appearance of justice.

Dated: March 2, 2009

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IN THE  
*Supreme Court of the United States*

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF OF AMICI CURIAE JOSE RAMOS-  
HORTA, WOLE SOYINKA, ADOLFO PEREZ  
ESQUIVEL, NADINE GORDIMER, RIGOBERTA  
MENCHU, JOSE SARAMAGO, ZHORES  
ALFEROV, DARIO FO, GUNTER GRASS, AND  
MAIREAD CORRIGAN MAGUIRE IN SUPPORT  
OF THE PETITION FOR WRIT OF CERTIORARI**

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## IDENTIFICATION OF *AMICI CURIAE*<sup>1</sup>

Ten Nobel Prize winners are *Amici Curiae*:

**Jose Ramos-Horta** was awarded the Nobel Peace Prize in 1996. He is the President of East Timor. Prior to being elected President, he was elected as the country's first Foreign Minister in 2002 and appointed Prime Minister in 2006. Ramos-Horta studied International Law at The Hague Academy of International Law and is a Senior Associate Member of the University of Oxford's St. Antony's College.

**Wole Soyinka** was awarded the Nobel Prize in Literature in 1986. A Nigerian author, Soyinka is considered Africa's most distinguished playwright. He was the first African to win the Nobel Prize in Literature. An outspoken critic of authoritarian Nigerian regimes, Soyinka was imprisoned for nearly two years during the Nigerian Civil War for his attempts to broker a peace accord. During the dictatorship of General Sani Abacha (1993-1998), Soyinka lived in exile in the United States. He is a Professor at the University of Nevada-Las Vegas, as well as a Professor in Residence at Loyola Marymount University.

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<sup>1</sup> This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part. *Amici* state that no person or entity other than *amici* and their counsel made any monetary contributions for preparation of this brief.

**Adolfo Pérez Esquivel** was awarded the Nobel Peace Prize in 1980. Born in Argentina, he is the co-founder of the Christian peace organization, Servicio Paz y Justicia, which promotes human rights throughout Latin America. Pérez Esquivel was imprisoned and tortured in Ecuador and Argentina in the late 1970's as a result of his peace and human rights work, which included the creation of an international campaign that urged the United Nations to create a Human Rights Commission. He has been awarded the Pope John Paul XXIII Peace Memorial.

**Nadine Gordimer** was awarded the Nobel Prize in Literature in 1991. Gordimer was born in South Africa and has spent her life there. Her literary work confronts moral and racial issues, and in particular--apartheid. Some of her works were banned by the South African apartheid government. She was active in South Africa's anti-apartheid movement and joined the African National Congress. She has continued her political work most notably in anti-censorship campaigns, as well as HIV/AIDS causes.

**Rigoberta Menchú** was awarded the Nobel Peace Prize in 1992. A Quiche Indian from Guatemala, Menchú was active in reform efforts in Guatemala, particularly concerning women's and Indian peasants' rights. Her family, including her brother, mother, and father, was arrested, tortured and killed by the Guatemalan government. Menchú was forced into exile in Mexico in 1981, where she authored the internationally renowned book, *I,*

*Rigoberta Menchú.* She is currently a UNESCO Goodwill Ambassador and continues her work on behalf of Guatemala's Indian peasant communities.

**José Saramago** was awarded the Nobel Prize in Literature in 1998. Born in Lisbon, Portugal, Saramago co-founded the National Front for the Defense of Culture in 1992. Saramago is a novelist, playwright and journalist. His writing is known for its empathy for the human condition. He continues to write about human rights issues.

**Zhores Alferov** was awarded the Nobel Prize in Physics in 2000. He is a Russian physicist and invented the heterotransistor, a technological breakthrough that helped advanced electronic computer technology, including cellular phones, bar-code readers and music players. Alferov has been active in Russian political affairs and has been a member of the Russian Parliament since 1995.

**Dario Fo** was awarded the Nobel Prize in Literature in 1997. Fo is an Italian playwright, director, stage and costume designer and music composer. His work was often found to be controversial in Italy and resulted in his receiving death threats. His work has been performed throughout the world.

**Günter Grass** was awarded the Nobel Prize in Literature in 1999. A prolific author, Grass won a number of literary awards and an archival museum was founded in his honor in Bremen, Germany.



Grass has been active in German political life, including the peace movement and electoral politics. He is currently working to create a German-Polish museum for artworks lost during World War II.

**Máiread Corrigan Maguire** was awarded the Nobel Peace Prize in 1976 in recognition of her work pursuing peace and resolution in armed conflicts. She is the co-founder of the Community of Peace People, an organization that urged a non-violent resolution to the Troubles in Northern Ireland. She continues this work and has traveled to over 25 countries. In 1992 she was awarded the "Pacem in Terris" Peace and Freedom Award, named after Pope John XXIII.

### INTERESTS OF *AMICI*

The *Amici Curiae* are ten Nobel Prize winners of diverse political ideologies who have spent much of their lives concerned with issues of justice. All are from countries where the existence of fair and impartial tribunals has been an issue of grave concern during their lifetimes. They and their countrymen have looked for leadership to the United States legal system, its Constitution, and its legal protections guaranteeing fair and impartial trials. They are alarmed by the convictions in this case and believe, if left standing, they will set a negative example in countries where the rule of law is not firmly established and denigrate the esteem in which the United States justice system is held.

As members of the international community, *Amici* wish to underscore violations of international legal norms that mandate a fair and impartial trial,

norms modeled on U.S. standards. International treaties ratified by the United States as well as customary international law reflect the U.S. constitutional requirement of a fair trial. The International Covenant on Civil and Political Rights provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171. Numerous other international treaties and declarations do likewise.<sup>2</sup>

For a number of years *Amici* have been attentive to this case. For example, in 2003, Amicus Nadine Gordimer wrote to the *The New York Times* stating, “[t]he trial was held in Miami where the . . . charges . . . could not be heard by anything other than a biased jury, since the area has a dominant presence of avowed enemies of Cuba.” Nadine Gordimer, Letter to the Editor, *Case of Five Cubans*, N.Y. TIMES, Apr. 13, 2003, at D12. In 2005 *Amici* signed a letter to Attorney General Alberto Gonzales protesting Petitioners’ continued incarceration after the

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<sup>2</sup> *E.g.*, African Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/rev.5; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948). The U.S. State Department in its Country Reports on Human Rights Practices evaluates countries based on their compliance with fair trial requirements. *E.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES TIBET, HONG KONG, & MACAU), §1(e) (Mar. 11, 2008).

Eleventh Circuit had reversed their convictions because of the inability to obtain a fair and impartial trial in Miami, Florida. Wole Soyinka et al., Open Letter to the Attorney General of the United States of America (Feb. 9, 2005) available at <http://www.embacubasiria.com/loscinco310805e.html> (last visited Feb. 25, 2009).

In that letter, which was subsequently signed by thousands of prominent international personalities, the *Amici* addressed the 2005 opinion of the Working Group on Arbitrary Detentions of the U.N. Human Rights Commission that the incarceration of Petitioners was arbitrary and in violation of Article 14 of the International Covenant on Civil and Political Rights. Report of the United Nations Working Group on Arbitrary Detentions, U.N. Doc. E/CN.4/2006/7/Add.1, at 60-65 (Oct. 19, 2005). This was the first time that the Working Group found a U.S. judicial proceeding violated the prohibition on arbitrary detentions. The Working Group found that the “climate of bias and prejudice against the accused” was so extreme that the proceedings failed to meet the “objectivity and impartiality that is required in order to conform to the standards of a fair trial” and “confer[red] an arbitrary character on the deprivation of liberty.” (*Id.* at 65.) Dozens of organizations and individuals around the world—including, for example, national parliaments and parliamentary committees on human rights joined in the condemnation. (Pet. App. 469a-91a.) No criminal trial in modern American history has received such international approbation.

*Amici* raise concerns about juror intimidation, selective enforcement of the law, and the biased community atmosphere in which the trial occurred. *Amici* have been aware of acts of violence and harassment against the Cuban government and of efforts to silence individuals, especially those living in Miami who are labeled "friendly" or even open to dialog with Cuba. They are also aware that at times the U.S was unwilling to prevent or punish unlawful actions against Cuba or against persons who expressed an interest in the normalization of relations with Cuba, and failed to enforce laws prohibiting and regulating the possession of weapons and explosives by those supporting the overthrow of the Cuban government.

*Amici* believe that, in these circumstances, Petitioners could not have received a fair and impartial trial and that their convictions and sentences were wrongful.

## REASONS FOR GRANTING THE WRIT

### I. Petitioners Did Not Receive A Fair And Impartial Trial Because Jurors Could Not Decide This Case Free From Fear Of Retaliation By The Anti-Castro Community

Persuasive evidence of prejudice in the Miami community against the Cuban government and its agents is set forth in the record and the Petition. However, that prejudice, and whether local jurors could decide the case free from this bias, is not the only lens for determining whether Petitioners received a fair trial. Assuming some jurors were free from that prejudice, a crucial question remains about the role that fear and intimidation played. Even if a

juror harbored no bias against the Cuban government or its agents, or even Petitioners who were so identified, he or she might have felt it was too risky to fail to support conviction. Fears would have ranged from shunning, to difficulties with Hispanic and Cuban friends, to workplace retaliation, to physical injury and possibly even death.

A number of objective factors show that jurors could not decide this case free from fear and intimidation and thus demonstrate that Petitioners did not receive a fair trial: (1) pervasive intimidation in the Miami community including violence against those deemed "sympathetic" to the Cuban government; (2) jurors' voir dire testimony; (3) media focus on the jurors, ensuring that their identities and faces were widely recognized and that they could not escape the community's eyes; (4) the fight over Elián González and the commemoration of the fifth anniversary of the shoot down of BTTR; and (5) the prosecutor's summation, which reinforced juror fear and intimidation.

These factors also made it difficult for jurors to voice their fears since such articulation alone could lead to negative consequences. In the Miami-Dade venue, there was simply no way to protect the jury from being enveloped in a cloud of intimidation—intimidation that had followed the dominant narrative in Miami for decades and that continued through the trial. The fact that no Cuban-Americans served on the jury did not guarantee a fair and impartial trial. On the contrary, no member of the community could escape the dominant community ethos of punishing and ostracizing those perceived as sympathetic to the Cuban government. Jurors' fears

of such reprisal arose not only from the Miami community's historical violence against and intimidation of those deemed not sufficiently hostile to the Castro regime, but also from contemporaneous acts of retaliation.

1. A demand for strict allegiance to an anti-Castro narrative has pervaded the Miami community for decades. The dream of returning to Cuba and overthrowing Castro had become an overriding community passion, and dissent from that vision was a punishable offense. See JOAN DIDION, *MIAMI passim* (1987). In April of 2000, The New York Times reported, "In Miami, Cuban Americans who favor more open relations with Havana say that advocating an end to the American embargo of Cuba or closer ties to the island has always brought scorn and threats and, in some cases, violence." Juan Forero, *The Elian Gonzales Case: The Cuban Americans; In Miami, Some Cuban Americans Takes Less Popular Views*, N.Y. TIMES, Apr. 27, 2000, at A1. In 1992, Human Rights Watch released a report documenting harassment, intimidation, and violence (including bombings, beatings and death threats) against Miami residents because of their moderate political views toward Castro or Cuban relations. HUMAN RIGHTS WATCH, *DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY* (1992). A second report was issued in 1994 when Miami residents who attended a conference in Cuba were besieged by death threats, bomb threats, verbal assaults, and economic retaliation. (Pet. App. 296a.)

Appendix A to this brief entitled, "Chronology of News Accounts Concerning Cuba-Related Violence in the Miami Area" lists acts that occurred between



1987 and 2000. This chronology does not describe the myriad other forms of retaliation, short of physical violence, employed to intimidate dissenters. Acts of harassment and violence by anti-Castro exile groups date at least as far back to the 1974 bombings of a Spanish-language publication, *Replica*. (Pet. App. 171a.) Two years later, radio journalist Emilio Millan's legs were blown off in a car bomb after he spoke out against exile violence. (*Id.*) As set forth in Appendix A, such incidents have continued for more than twenty-five years. They include bombings and arson attacks against businesses involved in or promoting commerce with, travel to, or humanitarian aid to Cuba; bombings of radio stations and print news offices, and death threats against journalists advocating dialogue with Cuba; and harassment of and assaults against Cuban artists and musicians performing in Miami.

In his dissent from the Eleventh Circuit's *en banc* decision, Judge Birch noted that trial evidence detailed the clandestine activities of "various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area," such that "the perception that these groups could harm jurors that rendered a verdict unfavorable to their views was palpable." (Pet. App. 312a.)

2. Voir dire testimony revealed that many prospective jurors feared for their safety or community standing if they voted to acquit Petitioners. When asked about a verdict's potential impact, prospective juror David Cuevas stated, "I would feel a little bit intimidated and maybe a little fearful for my own safety if I didn't come back with a verdict that was in agreement with what the Cuban



community feels, how they think the verdict should be," and that, "based on my own contact with other Cubans and how they feel about issues dealing with Cuba—anything dealing with communism they are against," he believed "they would have a strong opinion" about the outcome. (Pet. App. 176a.)

Jess Lawhorn, Jr., a banker and senior vice president in charge of housing loans, was "concern[ed] how ... public opinion might affect [his] ability to do his job" because he dealt with developers in the Hispanic community and knew that the case was "high profile enough that there may be strong opinions" which could "affect his ability to generate loans." (Pet. App. 176a-77a.) The trial judge also referred to the "impassioned Cuban exile community residing within this venue." (Pet. App. 126a.)

The fear reflected by these voir dire responses is confirmed in the results of a survey conducted by Professor Gary Patrick Moran on behalf of Petitioners. Over one-third of those polled said they would be worried about community criticism if they served on a jury that reached a not-guilty verdict in a Cuban spy case. (Pet. App. 236a.)

3. The media's attention to the trial and broad dissemination of jurors' names and identities meant that they could not escape community scrutiny. The jurors could not help but consider how the community might respond to a vote that contradicted the dominant community narrative. On the first day of voir dire, potential jurors were exposed to a press conference held by the victims' families on the courthouse steps. At that time, members of the press approached some of the prospective jurors. (Pet. App. 175a.) During the second week of jury selection, one

prospective juror complained of media harassment as he left the courthouse. (Pet. App. 253a.) As late as March 13, nearly four months into the trial, the court noted on the record that jurors were still being harassed by media. (Pet. App. 290a.)

On the first day of deliberations, jurors complained of feeling intimidated because television cameras were following them. The court responded by modifying the path of their entry to the courthouse. Despite this, the jurors were filmed again entering and leaving the courthouse "all the way to their cars." (Pet. App. 291a.) Well into the second week of jury selection, a prospective juror complained of media harassment as he left the courthouse. (Pet. App. 253a.) The district court commented on the "tremendous number of requests" for disclosure of jurors' voir dire questionnaires (Pet. App. 412a) and requests for the names of deliberating jurors once deliberations began (Pet. App. 124a). As late as March 13, nearly four months into the trial, the Court noted on the record that jurors were still being harassed by media. (Pet. App. 290a.) The district court repeatedly expressed concern about the media's intrusiveness and the futility of attempting to insulate the jury, but took no remedial action.

As Judge Birch noted in his dissent, "The electronic eyes of the community were focused upon them and the jury could not help but understand that focus." (Pet. App. 201a.) *See also* HUMAN RIGHTS WATCH, DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY (1992) (describing historic role of the Spanish-language media in identifying and warning those

who expressed opinions that differed from the anti-Castro community).

4. Two contemporaneous events reinforced jurors' fears of violence against them should they support a verdict favoring Petitioners. First, the case of Elián González stoked the exile community's fervor against the Cuban government and perceived sympathizers. The media focus on the Elián González matter was continuous and pervasive, persisting from November 1999 to at least June 2002. It was impossible to insulate the jury from these volatile sentiments. Published interviews of Cuban-Americans reveal the passions aroused by the matter. Dr. Max Castro, a senior research associate at the University of Miami who studies the exile community, said "I've never seen it so polarized." Forero, *supra*, at A1. Hilda Cossio Cohen said she was disheartened by what she heard after coverage of the Elián case began. "I think this thing has set us back 40 years," she said. "It's driven a wedge in the Cuban community." *Id.*

Second, the fifth anniversary of the shooting of the BTTR planes occurred during the trial. Over the February 24, 2001 weekend, commemorative flights, demonstrations, and public ceremonies marked the anniversary and the deaths of the people on the flights. Television interviews and newspaper articles amply covered those events. (Pet. App. 121a-2a, 194a-5a, 242a-3a.)

Petitioners asked the trial court to declare a mistrial because the commemoration "received a great deal of publicity, all of which was biased against the defendants and consistent with the government's position at trial." (Pet. App. 122a.) They maintained that "[n]o amount of voir dire or

instructions to the jury [could] cure the taint, whose ripple effects are difficult to measure." (*Id.*) They also requested a mistrial so that a fair trial could be held "in a venue where community prejudices against the defendants [were] not so deeply embedded and fanned by the local media." (*Id.*)

Within the context of such actions by Miami exile community, it is difficult to imagine that a jury could have acted free from fear of harm or repercussion if the trial resulted in an outcome favorable to Petitioners.

5. The prosecutor's trial summation fed on the dominant narrative to opposition to the Castro regime, which was literally enforced by the exile Miami community. The prosecutor argued that the jurors had to choose between a verdict for the Cuban government and a verdict for the community. He said that "the Cuban government" had a "huge" stake in the outcome of the case and that the jurors would be abandoning their community unless they found Petitioners guilty and convicted the "Cuban sp[ies] sent to ... destroy the United States." (Pet. App. 10a, 196a, 288a.) Sustaining an objection to this line of argument did not and could not cure the harm. The prosecutor – the attorney for the United States – confirmed what many jurors already feared: a verdict for Petitioners contradicted the interests and desires of the Miami community. Such official endorsement could only reinforce the perception that harm would result if the jurors did not vote to convict.

## II. Petitioners Did Not Receive A Fair And Impartial Trial Because The Jurors Could Not Decide This Case Free From Pervasive Community Prejudice Against Anyone Associated With The Cuban Government

The only way to avoid finding that community bias against the Cuban government had so infected public debate that a change of venue was required for a fair and impartial jury, was to ignore the evidence. This is precisely what the Eleventh Circuit and the trial court did. In evaluating the prejudice against Petitioners, the Eleventh Circuit refused to consider any evidence that did not directly name Petitioners or their alleged crimes. The district court refused to hear evidence "relate[d] to events other than the espionage activities in which the Defendants were allegedly involved." (Pet. App. 330a.) In other words, both courts refused to review or weigh any factual support for the seemingly self-evident proposition that anti-Castro prejudice pervades the Miami-Dade community. Not only did the Eleventh Circuit make "no findings regarding the prejudice within the community" (Pet. App. 211a), it also refused to consider the effect of contemporaneous occurrences such as the fate of Elián González. It found such evidence *per se* irrelevant to whether Petitioners could receive a fair trial in Miami. (Pet. App. 136a.)

The presence of the powerful anti-Castro sentiment in the Miami community was demonstrated in Petitioners' motions for a change of venue. In his dissent from the Eleventh Circuit's decision, Judge Birch noted that "the evidence submitted in support of the motion . . . was massive." (Pet. App. 164a.) In addition, the *voir dire*

demonstrated that the community was virulently anti-Castro. Finally, the survey results submitted by Petitioners substantiated the "atmosphere of great hostility towards any person associated with the Castro regime." (Pet. App. 164a) The anti-Castro bias was so powerful that real or apparent deviation from it was avoided.

The fact that the crimes of militant exiles were treated with impunity reinforced the validity of the community's anti-Castro sentiment. That militant exiles could possess illegal weapons and explosives yet not be charged with breaking the law served as government sanction of the harassment and intimidation practiced by the exile community.

For example, the jury was informed that a member of Alpha 66, Rodolfo Frometa, was stopped on October 19, 1993 while in a boat which had been towed to Marathon, Florida, and was questioned regarding weapons onboard. (Pet. App. 187a.) The weapons included seven semi-automatic Chinese AK assault rifles and one Ruger semi-automatic mini-14 rifle with a scope. (*Id.*) On October 23, 1993, he was again stopped while he and others were driving a truck that was pulling a boat toward the Florida Keys. (Pet. App. 188a.) Frometa explained that they were carrying semi-automatic assault rifles in order to conduct a military training exercise to prepare for political changes in Cuba or in the case of a Cuban attack on the United States. Then they were sent on their way. (*Id.*)

At trial it was shown that Alpha 66 members were stopped and released on February 7, 1994 for having weapons onboard their boat. Because a subsequent photograph of the group was "published



in the newspapers," "[e]verybody in Miami" knew that they had been released. (*Id.*)

On June 2, 1994 a member of F4 was arrested after attempting to purchase C4 explosives and a "Stinger anti-aircraft missile" to kill Castro and his close associates in Cuba. (*Id.*)

The far-reach of the community bias was further reinforced to the jurors through trial evidence showing the United States government's failure to respond to Cuba's requests to investigate terrorist acts in Cuba perpetrated by persons from the United States between 1990 and 1998. The Cuban government provided FBI agents with documentation of these attacks. (Pet. App. 192a.) The acts included an explosion on April 12, 1997 which destroyed the bathroom and dance floor at the discotheque Ache in the Media Cohiba Hotel; a bombing on April 27, 1997 at the Cubanacan offices in Mexico; the April 30, 1997 explosive device found on the 15th floor of the Cohiba Hotel; the July 12, 1997 explosions at the Hotel Nacional and Hotel Capri, both of which created "craters" in the hotel lobbies; the August 4, 1997 explosion at the Cohiba Hotel which created a crater in the lobby ; explosions on September 4, 1997 at the Triton Hotel, the Copacabana Hotel, the Chateau Miramar Hotel, and the Bodequita del Medio Restaurant; and the discovery of explosive devices at the San Jose Marti International Airport in a tourist van on October 19, 1997 and underneath a kiosk on October 30, 1997. (*Id.*) The explosions on September 4, 1997 killed an Italian tourist at the Copacabana Hotel, injured people at the Chateau Miramar Hotel, the Copacabana Hotel, and at the Bodequita del Medio Restaurant, and caused



property damage at all locations. (*Id.*)

The existence of bias against the Castro regime and the overwhelming support for exile groups, such as Brothers to the Rescue, is also illustrated by the treatment received by two of the most famous anti-Castro militants--Luis Posada and Orlando Bosch. Posada and Bosch were implicated in the October 6, 1976 attack on a Cubana airliner that killed all 73 persons aboard. David Binder, *Some Exiles Are Still at War With Castro*, N.Y. TIMES, Oct. 20, 1976, at 3. Bosch and Posada had received extensive training from the Central Intelligence Agency. *Id.* After the bombing, Posada was jailed in Venezuela at a minimum-security prison and remained there until he escaped in 1985. Simon Romero & Damien Cave Weiner, *Venezuela Will Push U.S. to Hand Over Man Tied to Plane Bombing*, N.Y. TIMES, Jan. 23, 2009, at A5. He surfaced in Panama where he was arrested with 33 pounds of C-4 explosives. Tim Weiner, *Cuban Exile Could Test U.S. Definition of Terrorism* N.Y. TIMES, May 9, 2005, at A1. In April 2004, he received an eight-year sentence in the U.S., but was pardoned in 2008. *Id.*

Bosch and his associates were linked to the assassinations of Cuban exiles who disagreed with them, various bombings, and an attack on Cuban fishing boats. Binder, *supra*. Bosch was also linked to a 1976 bombing that killed two Cuban officials at the Cuban Embassy in Lisbon, a bombing at the Cuban United States Mission, a bomb explosion in a luggage cart in Jamaica, the bombings of Cuban airlines office in Barbados and Panama, and the kidnapping of two Cuban embassy officials in Argentina. *Id.* When Bosch surfaced in Miami in 1989, the Justice

Department tried for a short time to deport him, saying that he "has repeatedly expressed and demonstrated a willingness to cause indiscriminate injury and death." Jeffrey Schmalz, *Furor over Castro Foe's Fate Puts Bush on the Spot in Miami*, N.Y. TIMES, Aug. 16, 1989, at A1. But the Cuban exile community came to his defense, and the Bush Administration overruled the deportation. Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile Brings Both Glee and Rage*, N.Y. TIMES, May 10, 2007, at A20; Weiner, *supra*.

Posada, who snuck into the U.S. in March or April of 2004, admitted to plotting attacks that damaged tourist spots in Cuba and killed an Italian visitor in 1997. Ann Louise Bardach & Larry Rohter, *A Bombers Tale: A Cuban Exile Details the 'Horrendous Matter' of a Bombing Campaign*, N.Y. TIMES, July 12, 1998, at A10. The U.S. refused to charge him, although the Justice Department called him "an unrepentant criminal and admitted mastermind of terrorist plots and attack on tourist sites." Mark Lacey, *Castro Foe With C.I.A. Ties Puts U.S. in an Awkward Spot*, N.Y. TIMES, Oct. 8, 2008, at A14. Venezuela has sought to extradite him, but thus far the U.S. has refused. Romero & Weiner, *supra*; Goodnough & Marc Lacey, *supra*.

The breadth and depth of the local community's anti-Castro bias was not lost on the prosecutor during Petitioners' trial. He shamelessly pandered to these prejudices, telling the jury that Cuba is a repressive government that did not believe in human rights (Pet. App. 199a); that it employs the "death penalty" for minor offenses (Pet. App. 193a); that it lacks "due process where courts and defenses are

allowed" (R122:14072); that "Castro wiped out the entire family" of witness Frometa (R24:14482); that Cuban government's "lies" are "an abomination to the Lord" (R124:14530-31); that "we are not operating under the Rules of Cuba, thank God" (Pet. App.123a); that the laws of "our great country" are superior to those of the "enemy," "the communist country of Cuba" (Pet. App.457a); that the defense utilized Cuban "propaganda" and that the propaganda must end (R122:14119). Finally, the prosecution wrongfully ascribed the words "final solution" to defense counsel's argument, suggesting that Cuba had invoked the infamous Nazi policy of extermination to justify the shooting of two aircraft (Pet. App.123a).

### **III. The Conviction Of Gerardo Hernandez For Conspiracy To Commit Murder Demonstrates That Impaneling A Jury Free From Anti-Castro Prejudices, And Free From The Fear Of Intimidation Was Necessary For A Fair And Impartial Trial**

Hernandez was indicted for conspiracy to commit murder, a conspiracy that applies only to an "unlawful killing." To constitute an "unlawful killing" the jury had to find beyond a reasonable doubt that Hernandez had agreed to shoot down the plane in international airspace and not in Cuban airspace, as the latter would not have been unlawful. (Pet. App. 453-65a, 350a.) To say the evidence was thin on this point would be a gross exaggeration.

On appeal, the Eleventh Circuit upheld Hernandez's conviction in a divided opinion, with two judges affirming the conviction and one judge

dissenting. The dissenting judge found insufficient evidence that an agreement to shoot down the plane existed, much less one to shoot it in international airspace: "At best, the evidence shows an agreement to 'confront' BTTR planes." (Pet. App. 85a.) But the dissent went even further. It pointed out that even if "confront" somehow meant to shoot down the planes, it was not proof that Hernandez had agreed to a shooting in international, not Cuban, airspace. In fact, as the dissent noted, "the evidence point[ed] toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act." (Pet. App. 87a.)

The majority's conclusion that there was evidence to support the existence of the requisite agreement relies on two inferences. First, the majority relies on evidence that Hernandez was told not to let Cuban agents fly with BTTR on certain days. Even if this was somehow sufficient for the jury to infer that Hernandez had agreed to shoot the plane (although other equally possible inferences could be drawn, such as the possibility Hernandez agreed to a forced landing), it is insufficient to prove beyond a reasonable doubt that an agreement existed. Second, the majority says that because Hernandez said the operation was successful and the Cuban government issued a commendation shows agreement. However, these facts cut against the existence of any agreement. The Cuban government has consistently maintained that the shooting took place in Cuban airspace. That Hernandez deemed the operation successful and received a commendation demonstrates, if anything, that if an agreement existed it concerned a confrontation in Cuban airspace. Again, as the dissent says, "the evidence

points toward a confrontation in Cuban airspace, thus negating the requirement that he agreed to commit an unlawful act." (Pet. App. 83a-6a.)

Judge Birch, who voted to uphold Hernandez's conviction on the conspiracy to commit murder charge, wrote a special concurrence saying that, "this issue presents a very close case." (Pet. App. 71a.) However, because of the appellate court's "standards of review with regard to Hernandez's conviction," Judge Birch affirmed it. (*Id.*) He had dissented in the *en banc* decision on the grounds that the request to change venue should have been granted. Read in this light, Judge Birch's concurrence upholding Hernandez's verdict appears illogical. It is difficult to understand, as it should be, how he could uphold a jury verdict in a "very close case," where he previously concluded that the jury had been unfair and biased. (*Id.*)

While Judge Birch felt compelled to point out that the case was "close," the dissenting judge believed there was no evidence to uphold the guilty verdict. Cases fitting such a description cry out for a jury that is unblemished by even a perception of intimidation or partiality. That is not the jury that was impaneled in this case. Instead, Petitioner Hernandez was tried by a jury so tainted by the community's bias against anyone remotely aligned with the Cuban government, that in the absence of sufficient evidence, they still found him guilty. Petitioners' motion for a change of venue should have been granted in the first instance, and Hernandez's conviction for conspiracy should be reversed.

#### IV. The Failure Of The Courts Of The United States To Reject A Jury Verdict Infected By Intimidation And The Fear Of Violence Encourages A Disregard For The Right To A Fair Trial

*Amici* are acclaimed internationally for their efforts to advance human rights in many parts of the world. They view the trial in this case as inimical to basic legal standards. It is well known that anti-Castro forces in Miami enforce their ethos with impunity--instilling fear through acts of violence and intimidation. If fear of retribution is permitted to infect jury deliberations in a United States courtroom, the world has become a less safe place for the protection of individual rights.

#### CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE  
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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

**BRIEF IN SUPPORT OF PETITION FOR A  
WRIT OF CERTIORARI  
ON BEHALF OF THE SENATE  
OF THE UNITED MEXICAN STATES,  
THE NATIONAL ASSEMBLY OF PANAMA,  
MARY ROBINSON (UNITED NATIONS HIGH  
COMMISSIONER FOR HUMAN RIGHTS, 1997-  
2002; PRESIDENT OF IRELAND, 1992-1997)  
AND LEGISLATORS FROM THE EUROPEAN  
PARLIAMENT AND THE COUNTRIES OF  
BRAZIL, BELGIUM, CHILE, GERMANY,  
IRELAND, JAPAN, MEXICO, SCOTLAND AND  
THE UNITED KINGDOM**

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Government Minister

Rt. Hon. Richard Caborn, former Minister

Angela E. Smith, former Minister

Gavin Strang, former Minister for Transport

Rt. Hon. Nigel Keith Anthony Standish Vaz,  
former Minister for Europe in the Foreign and  
Commonwealth Office

Jenny Willott, former Shadow Minister for  
Justice

Jeremy Corbyn, Vice-Chair - APPG on Human  
Rights

Andrew Dismore, Chair - Joint Human Rights  
Committee

Julie Morgan, Member - Justice Committee

Dr. Nick Palmer, Member - Justice Committee

Linda Riordan, Member - Justice Committee

Sandra Osborne, Member - Foreign Affairs  
Committee

Ken Purchase, Member - Foreign Affairs  
Committee

Michael Clapham, Member - APPG on Human Rights

Virendra Sharma, Member - Joint Committee on Human Rights and Member - Justice Committee

David Anderson, John Austin, Celia Barlow, Colin Burgon, David Burrow, Ronnie Campbell, Martin Caton, David Chaytor, Katy Clark, David Clelland, Harry Cohen, Frank Cook, Michael Connarty, Jim Cousins, David Crausby, Jon Cruddas, Ian Davidson, Dai Davies, Janet Dean, Jim Devine, Jim Dobbin, David Drew, Bill Etherington, Hwyl Francis, George Galloway, Neil Gerrard, Dr. Ian Gibson, Michelle Gildernew, Andrew Gwynne, Dai Havard, David Heyes, Kate Hoey, Paul Holmes, Kelvin Hopkins, Jim Hood, Rt. Hon. George Howarth, Dr. Brian Iddon, Lynne Jones, David Kidney, Ashok Kumar, Mark Lazarowicz, John Leech, David Lepper, Tony Lloyd (Chair - Parliamentary Labour Party), Andy Love, Rob Marris, Robert Marshall-Andrews QC, Chris McCafferty, John McDonnell, Jim McGovern, Austin Mitchell, Anne Moffat, Conor Murphy, Adam Price, Gwyn Prosser, Jim Sheridan, Marsha Singh, Alan Simpson, Dennis Skinner, Ian Stewart, Rt. Hon. Graham Stringer, David Taylor, Emily Thornberry, Mark Todd, Jon Trickett, Dr. Desmond Turner, Robert Wareing, Mike Wood, Derek Wyatt.



## **House of Lords**

Baroness Northover, Spokesperson for  
International Development in the House of  
Lords

Lord Rea of the House of Lords.

## **Former Ministers and Members of Parliament**

Tony Benn, former Cabinet Minister and  
Member of Parliament

Rt. Hon. Brian Wilson, former Government  
Minister and Member of Parliament

Kenneth Livingstone, former Mayor of London  
and Member of Parliament

John Biggs, Member of London Assembly

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## INTEREST OF AMICI CURIAE

Amici Curiae<sup>1</sup> are the Senate of Mexico, the National Assembly of Panama, the former United Nations High Commissioner on Human Rights, and legislators from the parliaments in nine of the oldest and largest democracies in the world and from the European Parliament. They have taken the unusual step of filing a brief with this Court because of the extraordinary human rights concerns that have been raised in the international arena by this case, given the centrality of the guarantee of trial by an impartial jury in any fair system of criminal justice. We describe their interests further, country by country.

### MEXICO

On February 10, 2009, the Senate of the United Mexican States took the extraordinary step of voting to appear as a body as *amicus curiae* before this Court, to argue against the human rights violations of the five Cuban petitioners and to urge the Court to order a new trial at a location other than Miami, Florida. The Resolution of the Mexican Senate is set forth in the Appendix to this brief in an English translation. The Resolution notes that the United States has ignored the decision of the

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<sup>1</sup> This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

## Working Group on Arbitrary Detentions of the Human Rights Commission of the United Nations.

Earlier, on September 28, 2006, the Senate of Mexico, in plenary session, had approved the resolution of the Working Group for Arbitrary Detentions of the Human Rights Commission of the United Nations with respect to the case of the Cuban Five and urged the Government of the United States to remedy the situation. In July 2008, the matter was presented to the Permanent Committee of the LX Legislature and referred to the North American Foreign Relations Commission for further proceedings. That Commission recommended that the Senate pass a new declaration in support of the human rights of the petitioners, based on the fact that they had not received a fair trial, as documented by the Working Group of the U.N. Human Rights Commission. As a result on October 7, 2008, the Senate again formally urged the United States to consider the Working Group decision and to respect the due process rights of these defendants, reiterated its support for the human rights of the Cuban Five, and authorized the transmittal of its resolution to the Governments of the United States and the Republic of Cuba and to all international organizations that have come out against the violation of human rights of the Cuban Five.

The brief is also signed by eighty-five Deputies of the House of Deputies of the United Mexican States (Cámara de Diputados de los Estados Unidos Mexicanos), including a Member of the Council of Europe, President of the Political Coordination Group of the House of Deputies and the Coordinator of the Partido de la Revolución Democrática in the Congress (Javier González Garza); the President of the

Commission on Constitutional Issues (Raymundo Cárdenas Hernández); the presidents of four other commissions; six members of the Human Rights Commission; and two secretaries and two members of the Foreign Relations Commission.

Mexican parliamentarians, jurists, and professors of law, human rights advocates, and representatives of other sectors of Mexican civil society share a common concern regarding the impact of the Cuban Five case on international law in general and international human rights law in particular, and more specifically on the complex web of relations between the United States, Cuba, and the United Mexican States (hereinafter Mexico). Mexico is the United States' second largest trade partner, and has been defined by U.S. policy as a strategic ally in regional efforts to combat terrorism, drug trafficking, and irregular migration, and in the promotion of a common hemispheric approach to issues regarding the rule of law and human rights. Mexico is the most populous Spanish-speaking country in the world, and the third most populous country in the Western Hemisphere. This gives it diplomatic weight in the hemisphere as a leader of Latin American countries, and in the world as a leader of developing countries.

The United States and Mexico have developed a wide variety of mechanisms for consultation and cooperation regarding the range of issues in which they interact. These include (1) periodic presidential meetings; (2) annual cabinet-level Binational Commission meetings with ten Working Groups on major issues; (3) annual meetings of congressional delegations in the Mexico-United States Interparliamentary Group Conferences; (4) NAFTA-

related trilateral trade meetings under various groups; (5) regular meetings of the Attorneys General and the Senior Law Enforcement Plenary to deal with law enforcement and narcotics matters; (6) a wide variety of bilateral border area cooperation meetings dealing with environment, health, transportation, and border crossing issues; and (7) trilateral meetings under the "Security and Prosperity Partnership (SPP) of North America" launched in Waco, Texas, in March 2005. All of this underlies amici's concerns regarding the impact of these cases on the intertwined juridical landscape shared by the United States and Mexico as a result of their convergent, increasingly interdependent status as state parties to key relevant aspects of the human rights system of the United Nations, and its regional equivalent in the Western Hemisphere, the Inter-American human rights system of the Organization of American States (OAS).

Mexico and issues involving Mexican citizens in Mexico as well as those living in the U.S., and the complex evolving convergences between the U.S. and Mexican legal systems and the relationship of both to international law and internationally recognized human rights standards have become increasingly evident in U.S. Supreme Court jurisprudence. Examples include: *Verdugo Urquidez v. United States*, 494 U.S. 259 (1990); *Alvarez Machain v. United States*, 504 U.S. 655 (1992); *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004) (three related cases arising from the activities of the U.S. Drug Enforcement Agency on Mexican territory, which gave rise to arguable violations of international law) and most recently *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (enforceability in U.S. state courts of rights to



consular assistance under Article 36 of the Vienna Convention on Consular Relations in the context of Mexican citizen sentenced to death).

## PANAMA

The National Assembly of Panama has taken the extraordinary step of appearing before this Court as *amicus curiae* to urge the Court to grant the petition for certiorari. Dr. Raúl Rodríguez Arauz, President of the National Assembly, the unicameral parliament of Panama, has been authorized to file this *amicus* brief to demonstrate the support of the National Assembly of Panama for the proposition that the Cuban Five have been imprisoned arbitrarily and illegally, as found by the Working Group on Arbitrary Detention of the U.N. Human Rights Commission.

The National Assembly has spoken on this matter on numerous occasions, including through Resolution No. 001 of, 03 October 2006 of the Committee on Foreign Affairs and The Special Declaration Of October 26, 2006, of the Inter-parliamentary Friendship Group of Panama with Cuba, where it stated "we adhere to the world growing outcry for the five, in order for them to have the right to a fair trial, an impartial jury and to ensure compliance with due process," and similar resolutions on October 20, 2007, by the Committee on Foreign Affairs, on October 10, 2007, by the Inter-parliamentary Friendship Group of Panama with Cuba, and on October 22, 2008, by the Foreign Relations Committee.

## MARY ROBINSON

Mary Robinson was the United Nations High Commissioner for Human Rights from 1997 to 2002 and the President of Ireland from 1992 to 1997. As a scholar, a barrister and an elected political leader, she has devoted her life's work to human rights and is one of the foremost advocates for human rights in the world. In 2004 she received Amnesty International's Ambassador of Conscience Award for her work in promoting human rights.

## EUROPEAN PARLIAMENT

This brief is joined by seventy-seven Members of the European Parliament (MEPs). They include two former Presidents (Josep Borrell Fontelles and Enrique Barón Crespo); three current Vice-Presidents (Miguel Angel Martinez, Rodi Kratsa-Tsagaropoulou, and Luisa Morgantini); a quaestor (Mia De Vits); the Chair of the Committee on Constitutional Affairs (Jo Leinen); Vice-Chair of the Subcommittee on Human Rights (Richard Howitt); Vice-Chair of the Committee on Civil Liberties, Justice and Home Affairs (Guisto Catania); Vice-Chair of the Delegation to the Euro-Latin American Parliamentary Assembly (Willy Meyer Pleite); Vice-Chairs of the Committee on Women's Rights and Gender Equality (Edite Estrela, Zita Gurmai, Raul Romeva i Rueda and Eva-Britt Svensson); Vice-Chair of the Committee of International Trade (Ignasi Guardans Cambó); and the chairs and vice-chairs of 19 other committees and European Parliament delegations to other countries and parliamentary bodies.

The European Parliament is the only directly elected parliamentary institution of the European

Union. It has been directly elected every five years by universal suffrage since 1979.

The Parliament is composed of 785 MEPs who serve one of the largest democratic electorates in the world and the largest transnational democratic electorate in the world (342 million eligible voters in 2004). MEPs act through seven different political groups representing the main ideological trends coexisting in Europe.

As an elected body, the Parliament not only drafts proposals addressing the functioning of the European Union, but also deals with worldwide problems and concerns, including violations of human rights wherever they occur, urging the authorities of the countries concerned to put an end to those violations. Respect for human rights and fundamental freedoms as well as for international humanitarian law are cornerstones of EU foreign policy. That includes the right of detainees to the presumption of innocence, as well as the right to have a fair trial and to exhaust all foreseen legal procedures for this purpose.

A significant group of MEPs, representing a large political and ideological spectrum of the European Parliament, has been for a long time concerned with the case of the Cuban Five as part of their commitment to the international protection of human rights. They have taken note with interest and concern of the opinions given by Amnesty International and of the decision of the Working Group on Arbitrary Detentions of the United Nations on this case. They have also been extremely concerned by the collateral effects on the Cuban Five's close relatives, particularly the wives of two of

them —Gerardo Hernández and René González— who have been refused their right to visit their husbands in prison. A Written Declaration was signed in 2007 by 187 MEPs from all the political groups, addressing the rights of these women.

Considering the international relevance and responsibility of the United States of America in upholding human rights, the signing MEPs, who represent different political groups in the European Parliament, and who enjoy leading positions in different Committees and Delegations, as well as in the highest bodies of this Chamber, ask the U.S. Supreme Court to take the case of the Cuban Five for consideration.

## BELGIUM

This brief is joined by five Representatives and two current and one former Senator of the Belgium Federal Parliament (Federaal Parlement van België), including the Chamber of Representatives' former Vice-President, its current Vice-President of the Commission on Foreign Policy and a former Member of the Council of Europe (Dirk Van der Maelen). The brief is also joined by five Members of the Flemish Parliament (Vlaams Parlement).

## BRAZIL

The brief is joined by seventeen Senators and one hundred, thirty-one Deputies of the National Congress of Brazil (Congresso Nacional do Brasil), including the Chair of the Commission on Human Rights and Participatory Legislation in the Senate and former First Vice-President of the Senate (Paulo

Paim); the Chair of the Commission on Foreign Relations and National Defense (Marcondes Gadelha); and the Chair of the Special Commission on Amnesty Law (Daniel Almeida) in the House of Deputies as well as the chairs of twenty-two other Standing, Special, External and Joint Commissions and Working Groups in the Senate and House of Deputies, from fourteen different political parties. Brazil is the fourth most populous democracy in the world and its geographic area covers nearly half of the continent of South America.

Members of the National Congress of Brazil have expressed their concerns for the denial of the fundamental human rights of the Cuban Five formally on three occasions. In August of 2006, the Commission of Human Rights of the Brazilian House of Representatives, in conjunction with the Brazil-Cuba Parliamentary Group, passed a "motion of condemnation against the illegal and arbitrary imprisonment of Five Cubans in the United States." Aldo Rebelo, the President of the Chamber of Deputies, by order of Deputy Luiz Eduardo Greenhalgh, the President of the Committee on Human Rights and Minorities, sent this motion to Congressman Dennis Hastert, Speaker of the U.S. House of Representatives through Clifford Sobel, U.S. Ambassador to Brazil. The motion was based in part on human rights guaranteed by Article 10 of the U.N. Universal Declaration of Human Rights requiring that a person accused criminally be tried by an independent and impartial tribunal. Finally, the Committee on Human Rights and Minorities and the Brazil-Cuba Parliamentary Group passed a third motion on April 10, 2007, again in defense of the

human rights of the Five Cuban prisoners based on internationally recognized principles.

These parliamentary actions reflect the concern of Brazilian civil society with the human rights of the petitioners, as reflected in the statement supporting them passed at the 10<sup>th</sup> National Conference on Human Rights of Brazil, with the participation of 700 Brazilian public and civil society organizations.

The Order of Attorneys of Brazil, the Brazilian Bar Association with almost 700,000 lawyer members, is joining a separate amicus brief in support of the petition for certiorari. One of the guiding principles of the OAB is Article 10 of the Universal Declaration of Human Rights, discussed *infra*, providing a right to an impartial tribunal, a right it believes was violated in Petitioners' case.

## CHILE

Four Senators and eight Deputies of the National Congress of Chile (Congreso Nacional de Chile), including the former Vice-President of the Senate (Senator Carlos Ominami); the current President of the Senate's Foreign Relations Commission (Senator Jaime Gazmuri); and the former President of the Human Rights Commission of the House of Deputies (Dep. Sergio Aguiló), join in this brief as amici.

The Human Rights Commission has requested Michelle Bachelet, the President of the Republic of Chile, to express to the Government of the United States its concern for the Five Cuban prisoners.



## GERMANY

Eight Members of the German Parliament (Bundestag), including the Deputy Chairman of the Committee on Legal Affairs in the Bundestag and former Judge in the Federal Court of Justice (Wolfgang Nešković) and a Parliamentary Secretary of State (Klaus Brandner) join this brief because of their concern for the human rights of the Cuban Five. This case has provoked considerable concern among the members of the Bundestag, who have written formal letters on July 1, 2004, June 16, 2006 and September 7, 2006, to the Members of the United States Congress to express their view that the conviction and sentences of the petitioners violated their fundamental rights to a fair and impartial trial. The deputies rely, in part, on the decision of the Working Group on Arbitrary Detention of the Commission on Human Rights of the United Nations. Fifty-three representatives, including the Bundestag Vice-president Petra Pau, signed the September 7, 2006 letter, requesting U.S. legislators to use their resources to support a new trial for the petitioners. The earlier letter of June 16, 2006, was signed by twelve representatives, including the Chairwoman of Parliamentary Commission on Human Rights and Humanitarian Aid, Professor Herta Daubler-Gmelin and the ex-Secretary General of the German Social Democratic Party (SPD), Klaus Uwe Benneter.

## IRELAND

This brief is joined by eleven Senators and thirty-three Deputies of the House of Representatives of the Parliament of Ireland (Tithe an Oireachtais), including three former Ministers of State, one of



them the former Government Chief Whip (Tom Kitt, John Browne and Noel Treacy); the Deputy Speaker of the Irish Houses of Parliament (Brendan Howlin); the Chief Whips of the Labour and Sinn Fein Parties (Emmet Stagg and Aengus Ó Snodaigh); the spokesperson on Justice, Equality & Law Reform and Foreign Affairs for the Green Party (Ciaran Cuffe); the spokesperson on Justice, Equality & Human Rights, Housing, International Affairs for the Sinn Fein Party (Aengus Ó Snodaigh), and the spokesperson on Justice, Equality and Law Reform for the Fine Gael Party (Charles Flanagan).

The Republic of Ireland is a parliamentary democracy governed by the Oireachtas which consists of the President and two houses, the Dáil Éireann and the Seanad Éireann. This amicus brief evidences the fact that since 2002 Irish parliamentarians have been consistently outspoken about the case of the Cuban Five. Most recently, two prominent Cabinet members, John Gormley, Minister for the Environment from the Green Party; and Barry Andrews, Minister for Children from Fianna Fáil, signed letters on their behalf along with 56 members of the Dáil Éireann, including all 20 Members of the Labour Party and all 4 Members of Sinn Fein.

On September 12, 2008, the 10<sup>th</sup> anniversary of the arrest of the Five Cubans, five members of the Oireachtas published a letter to the editor in the *Irish Independent* newspaper, concluding that the legal process in the case "falls short of the norms of international justice and appears to display evidence of political interference and anti-Cuban prejudice."

In February of 2006, 49 members of the Irish Parliament, including 8 senators, requested the release of the Five in a letter addressed to Attorney

General Alberto Gonzales, following an original letter to the Attorney General in September of 2005, in which 50 members of the Irish Parliament from various political parties had called for their release. In November 2003, a petition calling for the release of the Five and a new trial was signed by 51 members of the Irish Parliament including 26 members of Ireland's Labour Party. Emmet Stagg, Labour Party Whip, signed on behalf of all Labour Party T.D.s and Senators.

### **JAPAN**

This brief is joined by three current and two former Members of the House of Councillors and Five current and one former Representatives of the House of Representatives of the National Diet of Japan, including the former Speaker of the House of Representatives and Board Member of the Committee of Foreign Affairs (Takako Doi) and the former Director of the Foreign Affairs Committee of the House of Councillors (Osuma Yatabe).

### **SCOTLAND**

This brief is joined by fourteen Members of the Scottish Parliament, including a former Scottish Executive Minister (Malcolm Chisholm).

### **UNITED KINGDOM**

Ninety Members of the House of Commons join this brief to convey the broad interest in the United Kingdom in this case. More than 110 members of the British Parliament signed an open letter to the Attorney General of the United States on February 8, 2006, in support of the petitioners. The signatories included 97 Labour Party MPs, 10 Liberal

Democrats, 1 Conservative, 2 Plaid Cymru and 1 Respect MP. The letter requested the immediate release of the petitioners, known in the U.K. as the Miami Five. It noted that the convictions had been declared illegal by the Working Group on Arbitrary Detentions of the Human Rights Commission of the United Nations. In addition to parliamentarians, Nobel Prize winner Harold Pinter, then London mayor Ken Livingstone and 15 general secretaries of British unions joined 10,000 other English citizens who signed the letter.

This brief is consistent with the Parliamentary Early Day Motion, signed by 112 members of the House of Commons on November 21, 2002. The Early Day Motion #174 found that the nature of the charges, the location of the trial in Miami, Florida in an atmosphere of media and public intimidation, and the length of the sentences subsequently handed down, called into question the propriety of the judicial process. The motion called on the United States Government to support the petition for a retrial and to ensure that it is held in a venue that guarantees a fair trial.

The shared common law legal history and legal culture of the United Kingdom and the United States give the members of Parliament in the United Kingdom a special interest in urging the United States Supreme Court to maintain the highest standards of due process in criminal proceedings.

In addition to the interests expressed by those who have formally joined this brief, the amici note that numerous regional and national parliaments and parliamentary committees, as well as numerous individual parliamentarians, have protested the trial

of the petitioners as fundamentally unfair. They are identified in the Appendix to the Petition at 469A to 488A, and include: the Latin American Parliament;<sup>2</sup> MERCOSUR Parliament;<sup>3</sup> Latin American and Caribbean Parliamentarians;<sup>4</sup> more than 50 members of the 113<sup>th</sup> General Assembly of the Inter-Parliamentary Union; the Vice-President of the African, Caribbean and Pacific Parliamentary Assembly; 20 Deputies of Argentina's House of Deputies; the Human Rights, Nationality and Citizenship Commission of the Senate of Chile; 35 Members of Belgium's Flemish Parliament; Bolivia's National Senate and House of Deputies; the House of Deputies' Human Rights and Minorities Commission of the Congress of Brazil; the Chairs of 24 Parliamentary Commissions of Brazil's National Congress; 118 Deputies and 14 Senators in Brazil's National Congress; 56 Members of Canada's Parliament; Russia's Parliament (State Duma); 39 Senators of Italy's Senate, including the former Vice-President of the Senate and former Chairperson of the Judiciary Committee; former Speaker of the

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<sup>2</sup> Established by treaty. The Latin American Parliament consists of representatives elected by the parliaments of 22 Latin American and Caribbean countries: Argentina, Aruba, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Netherlands-Antilles, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

<sup>3</sup> Established by the Republics of Argentina, Brazil, Paraguay, Uruguay and Venezuela.

<sup>4</sup> Meeting of parliamentarians from fifteen countries in Latin America and the Caribbean as well as parliamentarians from five regional parliaments.

Japanese House of Representatives; Mali's National Assembly; Namibia's National Assembly; the President and Vice-President of Panama's National Assembly and the President of its Commission of Foreign Relations; the Foreign Relations Commission of Panama's National Assembly; 27 Deputies from Paraguay's House of Deputies; Peru's Congress; 48 Members of Switzerland's Federal Assembly; the Grand National Assembly of Turkey's Friendship with Cuba Parliamentary Group; and Venezuela's National Assembly.

### SUMMARY OF ARGUMENT

The United States Constitution has long served as a model for the rest of the world with respect to the protection of individual rights and the guarantee of due process of law in criminal trials. Yet amici are concerned that the record in this case reflects serious breaches of the rights of the petitioners at their trial in Miami. Petitioners were tried in a community hostile to them and to their government and in an atmosphere of barely repressed violence that made a fair trial before an impartial tribunal impossible.

International norms and the rule of law in all civilized nations require a trial before an impartial tribunal as an essential element of due process. The Working Group of the Human Rights Commission of the United Nations has found that petitioners' trial was in violation of the International Covenant on Civil and Political Rights. The historic mission of the United States Constitution requires this Court to review this case to insure that due process requirements are observed.

## ARGUMENT

**I. MEMBERS OF PARLIAMENTS IN OTHER COUNTRIES ARE LEGITIMATELY CONCERNED ABOUT THE HUMAN RIGHTS ISSUES PRESENTED IN THE PETITION FOR CERTIORARI.**

In 1988, a leading British barrister, Anthony Lester, Q.C., writing in the *Columbia Law Journal*, declared:

[T]he Bill of Rights is more than an historical inspiration for the creation of charters and institutions dedicated to the protection of liberty. Currently, there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.<sup>5</sup>

The instant case raises major concerns about whether the defendants received a fair trial before an

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<sup>5</sup> Anthony Lester, "The Overseas Trade in the American Bill of Rights," 88 *Colum. L. Rev.* 537, 541 (Apr. 1988). For the influence of U.S. law abroad, see also, Richard B. Lillich, "The Constitution and International Human Rights," 83 *Am. J. Int'l. L.* 851 (Oct. 1989).



impartial jury that go the heart of the guarantee of due process of law. That such serious human rights issues would concern government officials and jurists from other countries is hardly surprising. As has been frequently noted, "the U.S. Constitution has served as a model for human rights guarantees around the world."<sup>6</sup>

The tremendous influence of the United States in the immediate post World War II period has, of course, been tempered by the fact that as constitutionalism has spread, numerous sources of law have developed. Puisne Justice Claire L'Heureux-Dube of the Supreme Court of Canada has said that this has led to a world-wide conversation about human rights:

[A]s courts look *all* over the world for sources of authority, the process of international influence has changed from *reception to dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers." Reception is turning to

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<sup>6</sup> Mark C. Rahdert, "Comparative Constitutional Advocacy," 56 Am. U. L. Rev. 553, 566 (Feb. 2007).



dialogue.<sup>7</sup>

This conversation has developed, in part, because the challenges that many countries face create common legal problems. Prof. Rahdert explains, "In the twenty-first century, economic and technological developments, demographic changes, political, social, cultural, or religious issues, and world events often cross national boundaries, creating the same sorts of constitutional friction in more than one constitutional system."<sup>8</sup> He points out that nations committed to free speech share the problem of "saturated media coverage of high-profile criminal trials."<sup>9</sup> Thus the risks posed by the trial of the Cuba 5 in Miami are not unique to the United States, but might occur in any nation where a free press covered a criminal trial raising controversial issues in a community where passions ran extraordinarily high.

Constitutional problems in the administration of criminal justice are of course of great concern in any civilized society. And trial before an impartial fact finder is universally perceived to be a baseline requirement of constitutional fairness. For example, the European Convention on Human Rights, Art. 6, Para. 1, provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

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<sup>7</sup> Claire L'Heureux-Dube, "The Importance Of Dialogue: Globalization And The International Impact Of The Rehnquist Court", 34 *Tulsa L.J.* 15, 17 (Fall 1998).

<sup>8</sup> Rahdert, 56 *Am. U. L. Rev.* at 568.

<sup>9</sup> *Id.*

hearing within a reasonable time by an independent and impartial tribunal established by law."

International law demonstrates that these concerns are of international significance. The Universal Declaration of Human Rights, Article 10, provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."<sup>10</sup>

The specific legal issues raised by the petitioners in this case are the subject of international law, in particular the International Covenant on Civil and Political Rights,<sup>11</sup> which the United States has ratified. Article 9 of the International Covenant on Civil and Political Rights provides that, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 14 specifically provides, in pertinent part:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a

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<sup>10</sup> Universal Declaration of Human Rights adopted and proclaimed by General Assembly Resolution 217A (III) of December 10, 1948.

<sup>11</sup> Concluded at New York, Dec. 16, 1966. Entered into force, Mar. 23, 1976. 999 U.N.T.S. 171. Signed by the United States, Oct. 5, 1977. Ratified by the United States, June 8, 1992. Entered into force for the United States, Sept. 8, 1992.

competent, independent and impartial tribunal established by law.

Pursuant to the International Covenant on Civil and Political Rights, the Working Group of the Human Rights Commission of the United Nations examined the case of the instant petitioners. The Government of the United States was given an opportunity to respond to the complaint that the trial of the defendants had not complied with the guarantees of the International Covenant, and the Government furnished information within its control to the Working Group. Based upon "the climate of bias and prejudice against the accused in Miami" that "helped to portray the accused as guilty from the beginning" and the fact that "one year later [the Government] admitted that Miami was an unsuitable place for a trial as it proved almost impossible to select an impartial jury in a case linked with Cuba," and other factors, the Working Group concluded:

The deprivation of liberty of Mr. Antonio Herreros Rodriguez, Mr. Fernando Gonzalez Llort, Mr. Gerardo Hernández Nordelo, Mr. Ramón Labaniño Salazar and Mr. René González Schweret is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and corresponds to category III of the categories applicable to the examination of the cases submitted to the Working Group.<sup>12</sup>

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<sup>12</sup> Opinion No. 19/2005 (United States of America), Para. 32, Adopted, May 27, 2005. The Opinion is included in the Appendix to this brief.

This is the first time since it was formed in 1991 that the United Nations Human Rights Commission has condemned a trial in the United States as unfair.

Given the centrality of the guarantee of an impartial tribunal in any legal systems and the significance of the guarantees provided by article 14 of the International Covenant on Civil and Political Rights, amici urge this Court to make an unequivocal statement about the commitment of the United States to this overriding principle of due process of law by accepting this case for review.

## **II. THIS COURT SHOULD REVIEW THE EXCEPTIONALLY HIGH BARRIERS TO A CHANGE OF VENUE ERECTED BY THE ELEVENTH CIRCUIT COURT OF APPEALS.**

Amici support the argument made by petitioners that the decision of the Eleventh Circuit failed to protect their right to an impartial jury by sustaining the trial court's denials of their repeated motions for a change of venue and for a new trial. Without rehearsing that argument in its entirety, amici would emphasize some concerns of particular significance.

The record more than amply documented the existence in Miami of a large and very active community of people virulently opposed to the current government of Cuba, and the fact that the views of this community had infected public debate and discussion in the wider community to the extent

that virtually no one who lives in Miami could be unaware of or unaffected by them. *United States v. Campa*, 459 F.3d 1121, 1156-1161 (dissenting op. by Birch, J.). As petitioners have argued, the decision by the court below to hold that this evidence was categorically irrelevant to the fair trial claim is indefensible. Such a ruling is particularly inexplicable given that the prejudice against the current Cuban government and its agents was not merely passive, but as petitioners point out, "manifested itself in a pattern of violence directed at those deemed not sufficiently hostile to the Castro regime." (Cert. Pet., 26-27). Moreover, as Judge Birch explained, much of the evidence at trial discussed in detail the clandestine activities "of the various Cuban exile groups and their paramilitary camps that continue to operate in the Miami area," with the result that, "The perception that these groups could harm jurors that rendered a verdict unfavorable to their views was *palpable*." 459 F.3d at 1177 (emphasis added).<sup>13</sup>

The damage caused by this constant reinforcement of the Miami jurors' previous sensibilities about the Cuban émigré community simply was not and could not have been satisfactorily addressed through voir dire questioning in advance of trial. A change of venue was required to remedy the "perfect storm" created by "pervasive community sentiment," "extensive publicity both before and during the trial," prosecutorial misconduct and "the

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<sup>13</sup> The evidence regarding groups such as Alpha 66, BTTR and others is described in some detail at 459 F.3d 1165-1168.

prospect of violence from an already impassioned and emotional community possessed of firearms and bombs." 459 F.3d at 1179 (dissenting op. by Birch, J.).

Amici are particularly concerned that such a flagrant violation of the right to a trial before an impartial tribunal occurred in a prosecution of foreign nationals in the United States. The international community has a particular stake in protecting the rights of its members who may find themselves accused of serious criminal charges in a foreign country, and in insuring that they are not tried before jurors who run the risk of being terrorized by local purveyors of violence.

It is essential that the highest Court in the land review this case. Citizens of the United States would expect no less if this were occurring elsewhere in the world. The errors in the Eleventh Circuit Court of Appeals decision demand review, and nothing less will constitute an appropriate response to the Opinion of the Working Group of the Human Rights Commission of the United Nations and the extraordinary level of concern this case has generated in the world community. A failure of the Supreme Court to review this matter would not only leave a discreditable decision on the books and the petitioners in prison, but would seriously diminish the role of the United States as a model for other nations with respect to due process of law in criminal cases. The historic mission of the United States Constitution requires more. It requires this Court to grant the petition for certiorari.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

**APPENDIX**

**A. DECISION OF THE WORKING GROUP  
ON ARBITRARY DETENTIONS OF THE  
HUMAN RIGHTS COMMISSION OF THE  
UNITED NATIONS, MAY 27, 2005**

**UNITED NATIONS**

**Economic and Social Council  
Distr. GENERAL**

**E/CN.4/2006/7/Add. 1  
19 October 2005**

**ENGLISH**

**Original: ENGLISH/FRENCH/SPANISH**

**COMMISSION ON HUMAN RIGHTS**

**Sixty-second session**

**Item 11 (b) of the provisional agenda**

**CIVIL AND POLITICAL RIGHTS, INCLUDING  
THE QUESTION OF TORTURE AND  
DETENTION**

**Opinions adopted by the Working Group on Arbitrary  
Detention**

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its forty-first, forty-second and forty-third sessions, held in November/December 2004, May 2005 and September 2005, respectively. A table

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listing all the opinions adopted by the Working Group and statistical data concerning these opinions are included in the report of the Working Group to the Commission on Human Rights at its sixty-second session (E/CN.4/2006/7).

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Adopted on 26 May 2005 OPINION No. 19/2005  
(UNITED STATES OF AMERICA)

Communication addressed to the Government of the  
United States of America on 8 April 2004.

Concerning Mr. Antonio Herreros Rodríguez, Mr.  
Fernando González Llort, Mr. Gerardo Hernández  
Nordelo, Mr. Ramón Labaniño Salazar and Mr. René  
González Schweret.

The State is a party to the International Covenant on  
Civil and Political Rights.

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1. (Same text as paragraph 1 of opinion No. 20/2004.)

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

3. (Same text as paragraph 3 of opinion No. 20/2004.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.

5. The Working Group considered this case during its fortieth session and decided, in accordance with paragraph 17 (c) of its revised methods of work, to request additional information. It has received responses both from the Government and the source.

6. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

7. The source informed the Working Group about the following persons:

(a) Mr. Antonio Guerrero Rodriguez, American citizen, born in Miami, Florida, on 16 October 1958, resident of South Florida, a poet and graduate in aerodrome construction engineering of the University of Kiev, Ukraine;

(b) Mr. Fernando González Llort (Rubén Campos), Cuban citizen, born in Havana, on 18 August 1963, resident of Oxford, Florida, a graduate in international political relations of the Higher

Institute of International Relations attached to the Cuban Ministry for Foreign Affairs;

(c) Mr. Gerardo Hernández Nordelo (Manuel Viramontes), Cuban citizen, born in Havana, on 4 June 1965, married to Adriana Pérez O'Connor, a writer and cartoonist who has exhibited in various galleries and published articles in the Cuban press, a graduate in international political relations and resident of Lompoc, Florida;

(d) Mr. Ramón Labanino Salazar (Luis Medina), Cuban citizen, born on 9 June 1963 in Havana, a graduate in economics of the University of Havana and resident of Beaumont, Florida; and

(e) Mr. René González Sehwerert, American citizen, born on 13 August 1956 in Chicago, married to Olga Salanueva, a pilot and flight instructor and resident of Bradford, Florida.

8. It was reported that these five persons were arrested in September 1998 in Florida on charges of spying for the Government of Cuba. They did not offer resistance at the time of their arrest. It was also reported that they were denied the right to bail and were held for 17 months in solitary confinement. During the 33 months they spent in preventive detention, they were unable to communicate among themselves or with their families.

9. In June 2001, these five persons were tried in Miami Dade County. Lawyers for the defendants requested that the trial be conducted in another city in Broward County, because they considered that impartiality could not be guaranteed in Miami. It was reported that several anti-Cuban



Government right-wing organizations are based in that city and that many people there have biased, prejudiced and strongly held feelings against the Government of Cuba. According to the source, these organizations have created in the city such feeling against the Government of Cuba that it is impossible for artists and athletes from Cuba to perform or compete in Miami.

10. The lawyers' request was, however, rejected. The District Attorney opposed the application for a change of venue and argued that Miami has a heterogeneous and non-monolithic population in which the bias and prejudice which could exist in the community could be diffused.

11. According to the source, the trial was conducted in an emotionally charged atmosphere of media and public intimidation and in an environment virulently opposed to the defendants. Unknown individuals appeared in the courthouse with paramilitary-style uniforms. Outside the courtroom, noisy demonstrations were organized by Cuban-American organizations. Relatives of the four persons killed during the incident of 24 February 1996, in which two civilian aircraft were shot down by the Cuban Air Force, gave press conferences on the courthouse steps while jurors were arriving for hearings.

12. Antonio Guerrero Rodriguez was sentenced to life imprisonment plus 10 years; Fernando González Llort was sentenced to 19 years' imprisonment; Gerardo Hernández Nordele was sentenced to two life sentences plus 15 years; Ramón Labanino Salazar was sentenced to life imprisonment

plus 18 years; and René González Schwerert to 15 years' imprisonment.

13. The Government replied to the source's allegations by informing the Working Group that the FBI had arrested 10 people in September 1998 in connection with their covert activity in the United States on behalf of the Cuban Directorate of Intelligence. Of those 10, 5 admitted guilt, cooperated with the prosecution, were convicted and served their sentences. The other five were convicted by a jury in United States Federal Court in 2001. It was established in an open public trial that three of the five were "illegal officers" of the Directorate of Intelligence.

14. The Government stated that the defence at the trial did not deny the defendants' covert service with the Directorate of Intelligence, but rather attempted to present the defendants' activities as fighting terrorism and protecting Cuba against "counter-revolutionaries". Nearly three months of the seven-month trial were devoted to the presentation of evidence by the defence, including video depositions taken by the defence in Cuba.

15. It is stated that the accused received the full protection of the United States legal system, including counsel, investigators and experts provided at the expense of the United States Government. The jury, chosen following a week-long selection process, reflected Miami's diverse population. The defence attorneys had the opportunity to remove potentially biased jurors, and they used that opportunity to ensure that no Cuban-Americans served on the jury.

16. All five men are now serving their sentences in Federal penitentiaries, held among the

general prison population. They are allowed to receive visits by family members, Cuban Government officials and their lawyers, and they have the same privileges available to the general prison population. They have in fact received numerous, lengthy visits from family members. Sixty visas had been issued for them. The only family members to whom the United States Government has not issued visas are the wives of two of the accused.

17. The Government stated that evidence presented at the trial revealed that one of the wives was a member of the Wasp Network; she was later deported from the United States for engaging in activity related to espionage and was ineligible for return. The other wife was a candidate for training in Cuba to become an intelligence agent when the United States authorities broke up the network. All of their appeals concerning the issuance of visas are pending before the United States Eleventh Circuit Court of Appeals.

18. In a very extensive submission in reply, the source denounces arbitrary acts committed in the course of the trial. It reiterates that the defendants did not enjoy a fair trial, pointing out primarily that they were denied access to a lawyer during the first two days following their arrest and that they were under pressure to confess their guilt. Subsequently, they were kept in solitary confinement during the 17 months preceding the trial.

19. The source alleges that because the case has been declared to fall under the Classified Information Procedures Act (CIPA), all the documents constituting the evidence against the accused persons were classified as secret. Thereby,

the effective exercise of the right to defence was impaired.

20. The source adds that all the documents in the case file seized from the defendants were declared classified, including cooking recipes and family and other papers. Such classification under CIPA allegedly had a negative impact on the right to defence, as the defendants were thereby limited in the choice of their lawyers to lawyers approved by the Government, and both lawyers' and defendants' access to the evidence was limited.

21. It is alleged that before and during the trial, all the evidence in the case file was kept in a room under the court's control, and that the defence lawyers could access this room only after going through a bureaucratic procedure. The defence lawyers were also prohibited from making copies of the documents in evidence and from taking notes about them in order to analyse them. Moreover, the defence lawyers were prevented from taking part in the establishment of the criteria for the selection of evidence, as they were excluded from an ex parte conference between the prosecution and the court in which such criteria were defined.

22. According to the source, during the defence preparatory stage the documents presented as evidence by the Government side were identified with a specific code, which was changed in an arbitrary manner a few days before the start of the trial, damaging the work of defence counsel.

23. The source insisted that holding the trial in an inappropriate place affected the partiality of the jury because the jury members were under considerable pressure from the Miami American-

Cuban community. The source added that only a year after the sentencing of the accused, the same United States Government, in another case where it was itself accused, asked for a change of venue, presenting the argument that Miami was an inappropriate place for a trial because it was almost impossible to empanel an impartial jury for a trial concerning Cuba, given the prevailing strong opinions and feelings over this issue.

24. In accordance with its methods of work, the Working Group decided at its fortieth session to address the Government of the United States and the petitioners on three questions that would facilitate the work of the Group:

(a) How was the Classified Information Proceeding Act (CIPA) applied in this case?

(b) Did the eventual application of the Act affect the case in terms of access to evidence?

(c) If a case is classified as a national security case, what are the criteria for selecting evidence? The Working Group has received information from both the Government and the source on these questions.

25. The Government indicated that CIPA provides for an appellate review of decisions made by the trial court (as in this case) and that CIPA as such is only a procedural statute that neither adds to nor detracts from the substantive rights of the defendant and the discovery of evidence obligations of the Government. Rather, it balances the rights of a criminal defendant with the right of the Government to know in advance of a potential threat, from a criminal prosecution, to its national security. The

CIPA provisions are designed to prevent unnecessary or inadvertent disclosures of classified information and to advise the Government of the national security risk in going forward with proceedings.

26. The source replied that it had never contested the validity of the law, but rather its incorrect enforcement. It states that after collecting over 20,000 pages of documents (non-classified) through the above process, all of which were documents of the defendants, the Government classified each and every page "Top Secret" as if they were secret Government documents. Then the Government invoked the provisions of CIPA, which allowed the Government to restrict the access of the defence to the defence's own documents and thereby control the evidence available at trial.

27. The Working Group must decide, in the light of what precedes, if in this trial there has been an adherence to the international norms of a fair trial. The competence of the Working Group, therefore, does not imply either any pronouncement concerning the guilt of the individuals deprived of their liberty or the validity of the evidence, and even less replacing the Appellate Court that is handling the case. To have full information about the case, the Working Group would have preferred to see the judgement of the Appellate Court; however, since the appeals have been delayed the Working Group cannot postpone any longer the opinion that it has been asked to issue within the terms of its mandate.

28. From the information received, the Working Group observes the following:

(a) Following their arrest, and notwithstanding the fact that the detainees had been



informed of their right to remain silent and have their defence provided by the Government, they were kept in solitary confinement for 17 months, during which communication with their attorneys and access to evidence and, thus, possibilities of an adequate defence were weakened;

(b) As the case was classified as a matter of national security, access by the detainees to the documents that contained evidence was impaired. The Government has not contested the fact that defence lawyers had very limited access to evidence because of this classification, which affected their ability to present counter-evidence. This particular application of the legal provisions of CIPA, as the information available to the Working Group reveals, has also undermined the equal balance between the prosecution and the defence;

(c) The jury for the trial was selected following an examination process in which the defence attorneys had the opportunity, and availed themselves of the procedural tools, to reject potential jurors, and ensured that no Cuban-Americans served on the jury. Nevertheless, the Government has not denied that, even so, the climate of bias and prejudice against the accused in Miami persisted and helped to portray the accused as guilty from the beginning. It was not contested by the Government that one year later it admitted that Miami was an unsuitable place for a trial as it proved almost impossible to select an impartial jury in a case linked with Cuba.

29. The Working Group notes that it arises from the facts and circumstances in which the trial took place and from the nature of the charges and the harsh sentences handed down to the accused that the



trial did not take place in the climate of objectivity and impartiality that is required in order to conform to the standards of a fair trial as defined in article 14 of the International Covenant on Civil and Political Rights, to which the United States of America is a party.

30. This imbalance, taking into account the severe sentences received by the persons under consideration in this case, is incompatible with the standards contained in article 14 of the International Covenant on Civil and Political Rights which guarantee that each person accused of a crime has the right, in full equality, to all the facilities adequately to prepare his/her defence.

31. The Working Group concludes that the three elements enunciated above, combined together, are of such gravity that they confer an arbitrary character on the deprivation of liberty of these five persons.

32. In light of the preceding, the Working Group issues the following opinion:

The deprivation of liberty of Mr. Antonio Herreros Rodríguez, Mr. Fernando González Lloret, Mr. Gerardo Hernández Nordelo, Mr. Ramón Labaniño Salazar and Mr. René González Schweret is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political Rights and corresponds to category III of the categories applicable to the examination of the cases submitted to the Working Group.

33. Having issued this opinion, the Working Group requests the Government to adopt the necessary steps to remedy the situation, in

15a

conformity with the principles stated in the  
International Covenant on Civil and Political Rights.

**B. RESOLUTION OF THE SENATE OF  
MEXICO, FEBRUARY 10, 2009 (ENGLISH  
VERSION)**

[SEAL]

Senate of the Republic

LX Legislative Session

MOTION THAT THE SENATE MEMBERS OF THE EXECUTIVE COMMITTEE OF THE SENATE OF THE REPUBLIC PRESENT SO THAT A REQUEST BE MADE TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA, BY WAY OF AN "AMICUS CURIAE", THAT IT ACCEPT AND APPROVE THE APPEAL PRESENTED BY THE DEFENSE LAWYERS OF THE FIVE CUBAN PRISONERS IN THAT COUNTRY.

**HONORABLE ASSEMBLY:**

We, the senators of the Executive Committee of the Senate of the Republic, submit to the consideration of this Honorable Assembly, the following Point of Agreement, and also request that it be considered as an urgent and obvious resolution, as follows:

**BACKGROUND**

This past September 12th of 2008 was the 10-year anniversary of the unjust imprisonment in the USA of Gerardo Hernández, Ramón Labañino, Antonio Guerrero, Fernando González and René

González, five Cubans who monitored terrorist plans organized by groups of exiled Cubans in Florida against Cuba.

"The Five" Cubans have been condemned to long sentences that were the result of a politicized trial held in the city of Miami, and they have remained isolated in maximum security prisons and continue to suffer unjust imprisonment in different states of the United States.

The families of "The Five" live in Cuba, and in order to be able to travel and visit their imprisoned relatives they must obtain visas that are granted to them only after torturous procedures. Three of them, Ramón, Fernando and Antonio, have not even had one visit per year; Gerardo and René have been denied, without reasons, the right to be visited by their spouses, who have not been able to visit them at all during these long 10 years.

An appeal of the disproportional sentences was filed. On August 9, 2005, the panel of the Appeals Court in Atlanta ruled unanimously to revoke the sentences and to order a new trial.

Parallel to the appeals process, the Working Group on Arbitrary Detentions of the UN Commission on Human Rights issued an opinion that depriving the Five of their freedom violates Article 14 of the United Nations International Covenant on Civil and Political Rights and is therefore arbitrary, and on May 27, 2005, it asked the Government of the United States to take the measures necessary to remedy the situation.

The two bodies cited above recognize the right of "The Five" Cubans to be judged impartially in a non-hostile environment and to receive a fair trial as mandated by the Constitution of the United States of America.

The government of the United States ignored the request of the Working Group on Arbitrary Detentions of the UN Commission on Human Rights and appealed the decision of the court of Atlanta, which was reversed by the plenary of the Court in a split decision.

On June 4, 2008, another panel of three judges found that the arguments of the defense "lacked merit" and upheld the guilty verdicts of the Five Cuban antiterrorists and two of the sentences: that of René González Schwerert (15 years) and Gerardo Hernández Nordelo (two life sentences plus 15 years).

In addition, it annulled three of the sentences: that of Ramón Labañino Salazar (life sentence plus 18 years), Antonio Guerrero Rodríguez (life sentence plus 10 years) and Fernando González Llort (19 years), remanding them to the Court of Miami for new sentences to be issued by the judge, Joan Lenard, the same judge who committed irregularities in the trial and imposed the disproportional sentences.

On January 30, 2009, the lawyers for the defense presented an appeal of the case to the Supreme Court of the U.S.A., the highest court in the land and last legal recourse.

We in this Honorable Senate of the Republic have remained active and in solidarity in order to achieve the release of "The 5" Cuban prisoners, for

which reason we approved various motions in 2006 and 2008.

In 2007, along with Nobel Prize winners, politicians, intellectuals, and artists, as well as women and men from around the world, we signed a call for the freedom of the five Cuban prisoners in the United States.

The concept of "amicus curiae" (friend of the court) is an appeal filed by third parties who are not party to the lawsuit and who voluntarily present their opinion on a certain point in order to help the court resolve the matter underlying the lawsuit. It consists of a legal opinion, a testimony not requested by the parties, or a legal argument in the case.

The decision whether to admit an amicus curiae in this case is at the total discretion of the Supreme Court of the United States of America.

An amicus curiae is normally filed in trials in which individual rights are at stake or in cases of special importance in which the matter under consideration affects human rights.

Even though the United States is one of the countries that uses the amicus device most often, only around 1% of the cases that come up for review are accepted. In international law the amicus curiae has a place of prominence and is accepted by, among other organizations, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights.

For the above reasons we consider it just and in keeping with what has been expressed repeatedly that we appear before the Supreme Court of the

United States of America by way of an "AMICUS" to request that it accept and approve the appeal filed by the defense of "The Five."

Based on the provisions of Articles 58 and 59 of the Rules of Procedure for the internal governance of the General Congress of the United Mexican States, we submit to the consideration of this Assembly the following Point of Agreement, which we request be considered as requiring urgent and obvious resolution:

# POINT OF AGREEMENT:

SOLE POINT: We, the Senators of the Congress of the Union, respectfully request that the Supreme Court of the United States of America, by means of an "amicus", accept and approve the appeal filed by the defense of "the Five Cubans held prisoners in the United States", that they be given a new trial outside of Miami, with all procedural guarantees.

Given in the Assembly Hall of the Senate of the United Mexican States on the 10th day of the month of February of two thousand and nine.

[signature]

POINT OF AGREEMENT THAT, BY WAY OF AN "AMICUS", THE APPEAL IN FAVOR OF THE FIVE CUBAN PRISONERS IN THE UNITED STATES BE ACCEPTED.

EXECUTIVE COMMITTEE



[Signature]

Sen. Gustavo Madero Muñoz  
President

[Signature]

Sen. José González Morfín  
Vice President

[Signature]

Sen. Francisco Arroyo Vieyra  
Vice President

[Signature]

Sen. Yeidckol Polevnsky Gurwitz  
Vice President

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Sen. Adrián Rivera Pérez  
Secretary

[Signature]

Sen. Renán Cleominio Zoreda Novelo  
Secretary

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Sen. Claudio Sofía Corichi García  
Secretary

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Sen. Ludivina Menchaca Castellanos

Secretary

[Signature]

Sen. Gabino Cué Monteagudo

Secretary

MAR 6 - 2009

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(12)  
No. 08-987

**In The  
Supreme Court of the United States**

RUBEN CAMPA, RENE GONZALEZ,  
ANTONIO GUERRERO, GERARDO HERNANDEZ,  
and LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

**BRIEF AMICUS CURIAE OF DR. NELSON P.  
VALDÉS, DR. GUILLERMO GRENIER,  
DR. FÉLIX MASUD-PILOTO, DR. JOSÉ A. COBAS,  
DR. LOURDES ARGUELLES, DR. RUBÉN G.  
RUMBAUT, AND DR. LOUIS PÉREZ  
IN SUPPORT OF PETITIONERS**

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## OTHER AUTHORITIES

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Alba, Richard, & Victor Nee, <i>Rethinking Assimilation Theory for a New Era of Immigration</i> , INTERNATIONAL MIGRATION REVIEW, Vol. 31, No. 4. Winter 1997 .....	11
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Carver, Charles, <i>Havana Daydreaming: A Study of Self-Consciousness and the Negative Reference of Groups Among Cuban-Americans</i> , JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, Vol. 40, No. 3, March 1981.....	22
Contreras, Joseph, <i>Covering Elían in Print: How Did the Miami Media Do?</i> , HARVARD INTERNATIONAL JOURNAL OF PRESS/POLITICS, Fall 2000, Vol. 5, No. 4 .....	8, 17
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DURKHEIM, EMILE, <i>THE SOCIOLOGICAL METHOD</i> (New York Free Press 1938) (1895) .....	21
Editorial, MIAMI HERALD, October 7, 1997.....	17, 18
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Haney, Patrick J. & Walt Vanderbush, <i>The Role of Ethnic Interest Groups in U.S. Foreign Policy: The Case of the Cuban American National Foundation</i> , INTERNATIONAL STUDIES QUARTERLY 2nd ser. 43, 1999 .....	19
Marquis, Christopher, <i>Mas Canosa Dead at 58</i> , MIAMI HERALD, Nov. 24, 1997 .....	5
McHugh, Kevin E., Ines M. Miyares, & Emily H. Skop, <i>The Magnetism of Miami: Segmented Paths in Cuban Migration</i> , THE GEOGRAPHICAL REVIEW, Vol. 87, No. 4, October 1997 .....	7, 9
Moreno, Darío, <i>Exile Political Power: Cubans in the United States Political System</i> , <a href="http://metropolitan.fiu.edu/downloads/exile%20political%20power.doc">http:// metropolitan.fiu.edu/downloads/exile%20political %20power.doc</a> .....	18
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## TABLE OF AUTHORITIES – Continued

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Portes, Alejandro & Alex Stepick, <i>City on the Edge, in THE CUBA READER: HISTORY, CULTURE, POLITICS</i> (Aviva Chomsky, Barry Carr & Pamela Maria Smorkaloff, eds., Duke University Press 2003) .....	21
PORTES, ALEJANDRO & ALEX STEPICK, <i>CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI</i> (University of California Press 1993).....	8
Rasco, José Ignacio, interview, <a href="http://www.libertaddigital.com/opinion/victor-llano/fundador-de-la-democracia-cristiana-cubana-11919/">http://www.libertaddigital.com/opinion/victor-llano/fundador-de-la-democracia-cristiana-cubana-11919/</a> .....	25
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Sack, Kevin, <i>Politics: Florida, with a Major Primary Nearing, Little Havana Is Beginning to Look a Lot Like a Giant</i> , NEW YORK TIMES, March 9, 1996 .....	19
Senechal de la Roche, Roberta, <i>Collective Violence as Social Control</i> , SOCIOLOGICAL FORUM, Vol. 11, No. 1, March 1996 .....	23

## TABLE OF AUTHORITIES – Continued

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Sugarman, Ellen, <i>A Miami Vision of Our Future?</i> , INSIGHT ON THE NEWS, Sept. 28, 1998 .....	18
Thomas, Evan and Mark Hosenball, <i>Cubans At the Wheel</i> , NEWSWEEK, Dec. 11, 2000 .....	19
Valdés, Nelson P., <i>Cuban Political Culture: Between Betrayal and Death</i> , in CUBA IN TRANSITION: CRISIS AND TRANSFORMATION (Sandor Halebsky & John M. Kirk, eds., Westview Press 1992) .....	25
Van Dahm, Stacey, Nationalism and Narratives of Subjectivity in the Cold War Imagery (2007) (unpublished Ph.D. dissertation, University of California-Santa Barbara) (on file with the University of California-Santa Barbara) .....	22
Warren, Christopher L., John F. Stack, Jr., & John G. Corbett, <i>Minority Mobilization in an International City: Rivalry and Conflict in Miami</i> , PS, Summer 1986 .....	23
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## INTEREST OF *AMICI*

*Amici* are a group of United States social scientists with a significant accumulation of knowledge and publications related to the history, culture, society, and politics of Cuba and the Cuban-American community in the United States.<sup>1</sup>

- Dr. Nelson P. Valdés is a Professor Emeritus of Sociology at the University of New Mexico. He has written extensively about the politics of the Cuban Revolution.
- Dr. Guillermo Grenier is a Professor of Sociology at Florida International University. He has written extensively on the exile Cuban community in Miami.
- Dr. José A. Cobas is a Professor of Sociology at Arizona State University. He has written extensively on the political sociology of race relations in the United States, with a focus on Latino immigrant communities.
- Dr. Félix Masud-Piloto is a Professor of History at DePaul University. He is a Cuban-born United States citizen who has written

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<sup>1</sup> Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici*. No person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici* and their letters of consent accompany this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

extensively on the Cuban émigré community in Florida.

- Dr. Lourdes Arguelles is a Professor at the School of Educational Studies and in the Department of Cultural Studies at Claremont Graduate University. She has worked extensively with Latino immigrant enclave communities.
- Dr. Rubén G. Rumbaut is a Professor of Sociology at the University of California, Irvine. His extensive research has focused on the comparative study of immigrant and refugee communities in the United States.
- Dr. Louis Pérez is a Professor of History at the University of North Carolina-Chapel Hill. He has written extensively on the subject of Cuban history.<sup>2</sup>

*Amici* take no position on the guilt or innocence of the petitioners. Although *amici* represent a wide range of perspectives and opinions, *amici* agree that a thoughtful examination of the sociological aspects of ethnicity that impact whether venue should have been changed in this case will serve the public interest. *Amici* believe that the pervasive social influence

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<sup>2</sup> More complete biographies of *amici* are provided in the Appendix.

of the Miami-Dade Cuban-American ethnic enclave created an insurmountable juror bias in this matter.

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### SUMMARY OF ARGUMENT

The Cuban-American émigré community has created a powerful ethnic enclave in Miami-Dade County that is in essence an autonomous "city-state." The core thrust of the city-state is its anti-Castro ideology. Non-Cuban members of the "city-state" are influenced by extensive Cuban-American social, economic, and political pressure and by the exile ideology of the Cuban émigrés. As a consequence, anti-Castro and anti-Cuban beliefs pervade Miami-Dade County, profoundly shaping the media and justice system. Dissenters face political and economic consequences and possible violence. The petitioners, because they were agents of the Castro Cuban government, could not have had a fair trial in Miami-Dade County from jurors who would fear the stigma of a not guilty verdict. Accordingly, their trials should have been moved to a different venue.

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## ARGUMENT

### I. THE PERVASIVE ETHNIC ENCLAVE OF THE CUBAN-AMERICAN COMMUNITY OF MIAMI-DADE COUNTY HAS A SIGNIFICANT IMPACT ON THE ENTIRE COMMUNITY INCLUDING NON-CUBANS, CREATING WHAT AMOUNTS TO AN INDEPENDENT "CITY-STATE" THAT IS DRIVEN BY ITS ANTI-CASTRO IDEOLOGY.

Cubans constitute the largest population in Miami-Dade County. This population has transformed Miami-Dade County into a sort of autonomous city-state with its own economic and political power structure and its own political logic and ideology dominated by the anti-Castro, Cuban-American exile community. A city-state, as opposed to an ethnic enclave, sets itself apart and, when necessary, in counter-position to the dominant society. Those who rule in the city-state do not see themselves as integrated, absorbed or assimilated by the larger nation-state. The city-state associates with the dominant society only when it is useful to do so. The city-state will violate or dismiss the rules and procedures of the larger society unless it serves its objectives to follow them.

Jorge Mas Canosa, known as the most influential political leader of the Cuban-American ethnic enclave in Miami-Dade, expressed that alienation from the United States when he told the Miami Herald, "I am a misunderstood man. I have never assimilated. I never intended to. *I am a Cuban first. I live here only*

as an extension of Cuba.”<sup>3</sup> (Emphasis added). His political organization and lobby, the Fundación Nacional Cubana Americana, revealed its real function in its name.<sup>4</sup> In the ideology of exile, the Cuban-Americans inside the ethnic enclave constitute a nation abroad, a nation occupying a territorial base within the United States – Miami-Dade – serving the ultimate purpose of re-conquering Cuba. One author described this phenomenon as an “exile government-in-waiting.”<sup>5</sup> When the Cuban-American National Foundation opened offices in Washington, D.C. in 2001, Jorge Mas Canosa described the building as “the embassy of Free Cuba.”<sup>6</sup>

By 1980 the anti-Castro elite who left Cuba and became exiles in the United States had developed the political strategy of using the “enclave” to project United States policy in Latin America. This strategy has made possible this semi-autonomous city-state within the United States. “An ethnic enclave is a strong ethnic community that is organized around a highly differentiated range of enterprises and institutions,

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<sup>3</sup> Christopher Marquis, *Mas Canosa Dead at 58*, MIAMI HERALD, Nov. 24, 1997.

<sup>4</sup> Literally translated, the name is “Cuban-American National Foundation.”

<sup>5</sup> ANN LOUISE BARDACH, *CUBA CONFIDENTIAL: LOVE AND VENGEANCE IN MIAMI AND HAVANA* 126 (Random House 2002).

<sup>6</sup> Rui Ferreira, *La Fundación abre su ‘embajada’ en Washington*, NUEVO HERALD, Feb. 7, 2001.

which serve, and profit from, the community.”<sup>7</sup> On matters of foreign policy regarding Cuba, the Miami-Dade city-state has enjoyed the equivalent of power sharing with the executive and legislative branches of the U.S. government. Consequently, the overall power of the Cuban-American enclave resembles the political, economic, social and cultural resources of what is effectively a separate nation-state that shapes, influences and ultimately controls public opinion within it. The United States government “can encourage the birth and growth of an ethnic interest group and incorporate it into the formal foreign policy apparatus.”<sup>8</sup> And, as we argue below, dissent on matters related to Cuba is not tolerated and is often met with violence.

#### **A. The Large, Unified Cuban-American Community Influences Nearly Every Aspect of Life in Miami-Dade County.**

According to the 1990 Census, Cubans residing in the Miami-Dade area accounted for 53% of the total U.S. Cuban population (up from 50% in 1980). Ten years later, the Miami Cubans represented 65% of all Cuban-Americans. Cubans have consistently increased in the Miami-Dade area and “have become

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<sup>7</sup> Declaration of Professor Lisandro Pérez, at 5. *Amici App.* at 28a-29a.

<sup>8</sup> PATRICK JUDE HANEY & WALT VANDERBUSH, *THE CUBAN EMBARGO: THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY* 48 (University of Pittsburgh Press 2005).

increasingly concentrated in South Florida.”<sup>9</sup> Seventy-eight percent of all Cubans in Florida live in Dade County.

It is important to keep in mind that persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in Miami-Dade County. According to the 2000 U.S. Census of Population and Housing, in the county there are more persons of Cuban birth or descent (650,600) than there are white non-Hispanics (465,770), more than African-Americans (427,140), and more than all the other Hispanic nationality groups combined (641,130). Two of every seven people in Greater Miami is a Cuban. It is not just one more immigrant group in the city’s race/ethnic mosaic. It is the largest group, period, among immigrants or nonimmigrants alike.<sup>10</sup>

The sheer numbers of a large, unified community can have an enormous impact on the members of a jury and on the mass media. The editor of the Miami Herald, David Lawrence, acknowledged this impact when he wrote that reporters at the Miami Herald during the Elián González case “were subtly or overtly intimidated by the overwhelming consensus

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<sup>9</sup> Kevin E. McHugh, Ines M. Miyares, & Emily H. Skop, *The Magnetism of Miami: Segmented Paths in Cuban Migration*, THE GEOGRAPHICAL REVIEW, Vol. 87, No. 4, October 1997, at 508.

<sup>10</sup> Declaration of Professor Lisandro Pérez, at 3 *Amici App.* at 27a-28a.

among Miami's estimated eight hundred thousand Cuban-Americans. . . ."<sup>11</sup>

The Cuban-American presence in Miami-Dade is not just the sum total of over half a million people. Society is more complicated than that. Miami-Dade is glued together by highly politicized Cuban-American social networks. Non-Cubans, as described below, are part of that array of networks: from marriage to financial transactions to shared urban spaces to favorite restaurants to shared attitudes about the Cuban government. This creates social density that is the tapestry of social relations shaping and guiding thought and behavior; it is a community connected by personal ties, shared histories, interests and social institutions and with strong emotional feelings about certain political themes. The academic literature recognizes the unique character of Miami-Dade.<sup>12</sup>

Miami has the highest proportion of foreign born population of the major Metropolitan areas in the United States. Their impact has been so dramatic that it is doubtful that there is another urban area in the United States in which the theme of immigration

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<sup>11</sup> Joseph Contreras, *Covering Elian in Print: How Did the Miami Media Do?*, HARVARD INTERNATIONAL JOURNAL OF PRESS/ POLITICS, Fall 2000, Vol. 5, No. 4, at 123-127.

<sup>12</sup> ALEJANDRO PORTES & ALEX STEPICK, *CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI* (University of California Press 1993).

has such a major presence in both private conversation and public discourse.<sup>13</sup>

By 1980, Cuban-Americans in Miami had become a "pivotal local power" in the economy, politics and government.<sup>14</sup> Anglo economic hegemony progressively declined.<sup>15</sup> Moreover, the influence of Cubans in Miami-Dade extends to Cuban-Americans throughout the nation.

"[T]he Cuban settlement system [in the U.S.] should be viewed as an ethnic archipelago, a network of urban clusters anchored by Miami. The archipelago metaphor emphasizes ethnic concentrations connected by flows of information and people rather than functioning as isolated islands."<sup>16</sup> (Emphasis added).

Professor Lisandro Pérez has described the importance of the Cuban influence in Miami-Dade:

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<sup>13</sup> GUILLERMO GRENIER & ALEX STEPICK, *MIAMI NOW!: IMMIGRATION, ETHNICITY, AND SOCIAL CHANGE 3* (University Press of Florida 1992).

<sup>14</sup> *Id.* at 10.

<sup>15</sup> In Miami-Dade, in 2002, Hispanic ownership of "employer firms" represented 39% of the total (for the U.S. it was 4%). *An Overview of the Socio-Economic Condition of Miami-Dade County, Social and Economic Development*, Council Miami-Dade County Department of Planning and Zoning Planning Research Section, May 2007, at 61.

<sup>16</sup> Kevin E. McHugh, Ines M. Miyares, & Emily H. Skop, *The Magnetism of Miami: Segmented Paths in Cuban Migration*, *THE GEOGRAPHICAL REVIEW*, Vol. 87, No. 4, Oct. 1997, at 504-519.

In social, political, and economic terms Cubans exert an influence in Miami-Dade County that extends well beyond the Cuban community itself. Those who arrived from Cuba in the 1960s established the bases of that community. They were disproportionately drawn from the upper sectors of Cuban society. Many were professionals or entrepreneurs and had university degrees. A significant proportion had previous business experience, and more than a few had contacts with U.S. companies that had done business with Cuba before the revolution. Furthermore, their migration was facilitated by the U.S. government, which gave them entry as refugees and provided them with economic assistance.<sup>17</sup>

**B. The Exile Ideology of the Cuban-American Enclave Extends To All Members of the Community, Including Non-Cubans.**

The first Cuban exiles and émigrés left Cuba because they lost economic resources, political power and social standing under Cuba's new government. They had been well-off, so coming to the United States represented a significant defeat. However, those émigrés "entered the United States through

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<sup>17</sup> Declaration of Professor Lisandro Pérez, at 4. *Amici* App. at 28a.



political channels" that created long-term consequences and shaped their long-term identity.<sup>18</sup> These first Cuban émigrés enjoyed exceptional and preferential entry treatment that has contributed to a generalized sense within the enclave that this population is above American law on all matters involving Cuba. This preferential political and economic treatment allowed the early exiles to reconstitute the economic and political power they had in Cuba.<sup>19</sup> The earlier waves of exiles thus became the dominant sector of the Miami-Dade "ethnic enclave economy."

In a dominant enclave economy, shared ethnicity and shared political philosophy matters greatly. If one does not have the proper ethnicity in the economy of an ethnic enclave, one is at a significant economic disadvantage. This phenomenon has been called acculturation in reverse.<sup>20</sup> For example, Eduardo Padrón, a Cuban-American and former president of Miami-Dade Community College, has acknowledged that non-Spanish speakers would feel intimidated

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<sup>18</sup> Carlos A. Forment, *Political Practice and the Rise of an Ethnic Enclave: Cuban American Case, 1959-1979*, THEORY AND PRACTICE, No. 18, 1989, at 50.

<sup>19</sup> Cuban-Americans received over one billion dollars to settle once they were in the U.S., plus automatic residency status. Tomas D. Boswell, *A Demographic Profile of Cuban Americans*, Cuban-American National Council, 1994, at 31.

<sup>20</sup> Richard Alba & Victor Nee, *Rethinking Assimilation Theory for a New Era of Immigration*, INTERNATIONAL MIGRATION REVIEW, Vol. 31, No. 4. Winter 1997, at 826-874.

when seeking employment in the Miami-Dade community.<sup>21</sup> In such circumstance it is much easier to adopt the dominant political values of the Cuban-American enclave than to challenge them. The only other viable option is leaving the city and county.<sup>22</sup>

**C. The Exile Ideology Creates an Unreasonable Anti-Castro Bias That Influences the Entire Miami-Dade Community, Including Prospective Jurors.**

Cuban-American power in Miami-Dade began in 1959, when the city of Miami began coordinating and carrying out anti-Cuban government activities promoted by the United States government, particularly its intelligence services.<sup>23</sup> One author has described Miami as "the intrigue capital of the hemisphere."<sup>24</sup>

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<sup>21</sup> William Booth, *America's Racial and Ethnic Divides: A White Migration North From Miami*, WASHINGTON POST, Nov. 11, 1998, at A1.

<sup>22</sup> From 1960-1990 the "non-Hispanic White" population dropped from 80% to 30%. William Booth, *America's Racial and Ethnic Divides: A White Migration North From Miami*, WASHINGTON POST, Nov. 11, 1998, at A1.

<sup>23</sup> Carlos A. Forment, *Political Practice and the Rise of an Ethnic Enclave: Cuban American Case, 1959-1979*, THEORY AND PRACTICE, No. 18, 1989, at 47-81; Lourdes Arguelles, *Cuban Miami: the Roots, Development, and Everyday Life on an Émigré Enclave in the U.S. National Security State*, CONTEMPORARY MARXISM, Summer, 1982, at 27-43.

<sup>24</sup> JOEL GARREAU, *THE NINE NATIONS OF AMERICA* 174 (Avon Books 1981).

The highly political and violent origins of the Cuban-American elite in Miami should not be dismissed.<sup>25</sup> An anti-Castro, clandestine, coercive and violent political culture and practice can be traced to those years. From a political standpoint, no other city in the United States could be so biased against admitted pro-Castro Cuban defendants or so apt to turn to violence against dissenters.

Although the political aspect of the exile ideology is central in predisposing the population of Miami-Dade, what we wish to stress is the emotional, irrational and intolerant behavior components that have important consequences on the issue of community prejudice and bias. Professor Lisandro Pérez notes:

The goal of the Cuban exile is the overthrow of Fidel Castro, and this is to be accomplished through hostility and isolation. Energizing that struggle is the highly emotional nature of the exile ideology. The least favorable side of emotionalism and irrationality is intolerance to views that do not conform to the predominant "exile" ideology of an uncompromising hostility towards the Cuban government. Those inside or outside the community who voice views that are favorable or even "soft" or conciliatory with respect to Castro are usually subject to

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<sup>25</sup> The same author wrote that "[s]ecrecy punctuated by tall tales envelopes aspect after aspect of Miami. A reporter attempting to get a description of the internal workings of the place is tempted to throw up his hands." *Id.* at 174.

criticism and scorn, their position belittled and their motives questioned. Any dissent in Miami is especially difficult. The Cubans' pervasive influence in Miami means that great pressures can be brought to bear on the dissenting individual or group.<sup>26</sup>

This exile ideology is pervasive and deeply ingrained. For example, in a recent survey, Cuban-American respondents were asked whether all points of view were heard in Miami. Approximately 60% of respondents expressed a desire to hear an even stronger anti-Castro sentiment.<sup>27</sup>

Few escape from the exile community's pressure. For example, in 1993, a City of Miami commissioner proposed that anyone who "supported Fidel Castro" should be legally barred from freely expressing such views.<sup>28</sup> The Christian Science Monitor on April 21, 2000, ran a story entitled "In Miami, Free Speech is Selective." The author, Warren Richey, reported that "Critics say those who disagree with the hard-line

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<sup>26</sup> Declaration of Professor Lisandro Pérez, at 8. *Amici App.* at 32a.

<sup>27</sup> Guillermo Grenier, *The Creation and Maintenance of the Cuban American 'Exile Ideology': Evidence from the FIU Cuba*, JOURNAL OF AMERICAN ETHNIC HISTORY, Winter/Spring 2006, at 219.

<sup>28</sup> *A Distasteful Proposal: Freedom of Expression*, MIAMI TIMES, March 25, 1993, at 4A.

opinions of Cuban-exile leaders routinely face intimidation, threats of violence, or outright censorship."<sup>29</sup>

The printed media in Miami-Dade has a consistent history of bias on matters related to the government of Cuba or anyone who identifies with, supports or defends anything that appears to be pro-Cuban government. This is even more pronounced on the Miami-Dade radio stations that discussed this case pre-trial.<sup>30</sup>

Anything from Cuba is considered illegitimate in the exile ideology. The changes in the editorial policy of the Miami Herald make this clear. In 1992, the Miami Herald was an independently-minded publication. Powerful exile political organizations disagreed with its editorial line, which included a more inclusive attitude toward Cuba. Vandalism against the paper became a common occurrence. The New York Times reported on the campaign of vandalism and threats against the Miami Herald after Mas Canosa's exile organization questioned "the newspaper's devotion to the cause and treated any skepticism of its

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<sup>29</sup> Warren Richey, *In Miami, Free Speech Is Selective*, CHRISTIAN SCIENCE MONITOR, April 21, 2000.

<sup>30</sup> *Dangerous Dialogue: Attacks on Freedom of Expression in Miami's Cuban Exile Community*, Americas Watch: The Fund for Free Expression, Vol. 4, No. 7, August 1992, at 16-20.

own policies and activities as a slur against all Cuban-Americans."<sup>31</sup> As another author noted:

Anywhere else, Mas Canosa's remarks might have been ignored. In the darker recesses of Miami's exile community; however, his words were clearly a call to arms. Within days Herald publisher David Lawrence, Jr., and two top editors received death threats. Anonymous callers phoned in bomb threats and Herald vending machines were jammed with gum and smeared with feces. Mas Canosa's Cuban American National Foundation quickly denied responsibility and condemned the hijinks, but Mas's words were highly inflammatory in a city where public red-baiting has served as a prelude to bombings and, in past years, murder.<sup>32</sup>

One Miami Herald editorial said of the leader of the Cuban-American National Foundation, "you are a powerful person, here and in Washington, and you would like to hurt us, destroy us, if you could."<sup>33</sup> The newspaper succumbed to the intimidation and a few years later the views of the formerly independent newspaper had shifted dramatically to the exile ideology of the Cuban-American enclave.

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<sup>31</sup> Larry Rother, *When a City Newspaper Is the Enemy*, NEW YORK TIMES, March 19, 1992, at A16.

<sup>32</sup> Anne Marie O'Connor, *Trying To Set the Agenda in Miami*, COLUMBIA JOURNALISM REVIEW, May/June 1992.

<sup>33</sup> Larry Rother, *When A City Newspaper Is the Enemy*, NEW YORK TIMES, March 19, 1992, at A16.



Professor Lisandro Pérez states it well, that pre-trial media coverage was biased and unfavorable to the accused in the case.<sup>34</sup> Moreover, shortly before jury selection, the political "battle" to retain Elián González was fought in part through the use of the mass media in south Florida.<sup>35</sup> The media's response to that event is indicative of how the media responds to anything or anyone pro-Cuban government. The Miami Herald took the side of the exiles.<sup>36</sup> The editors of the Miami Herald have acknowledged that they were intimidated by the community's feelings. One editor noted that "trying to convince south Florida to be historically accurate, or principled, is tantamount to spitting into the wind."<sup>37</sup>

Similarly, the Spanish language AM frequency radio stations in the community had been historically incendiary. Before and during the trial in this case, neither the mass media, nor the general public had been able to enjoy free speech on matters involving Cuba in Miami-Dade. A First Amendment rights group in Miami went on record stating that in Miami

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<sup>34</sup> Declaration of Professor Lisandro Pérez, at 3. *Amici App.* at 27a.

<sup>35</sup> Susan Candiotti, *Elian Photo Op: Where TV News Met Street-Corner Politics*, HARVARD INTERNATIONAL JOURNAL OF PRESS/POLITICS, Fall 2000, Vol. 5, No. 4, at 118-122.

<sup>36</sup> Joseph Contreras, *Covering Elian in Print: How Did the Miami Media Do?*, HARVARD INTERNATIONAL JOURNAL OF PRESS/POLITICS, Fall 2000, Vol. 5, No. 4, at 123-127.

<sup>37</sup> Editorial, MIAMI HERALD, Oct. 7, 1997.



"you can say whatever you want as long as it is what [exile leaders] want to hear."<sup>38</sup>

#### **D. The Anti-Castro Cuban-American City-State Has Had Extraordinary Success.**

In one generation, four Cuban-Americans were elected to Congress and Cuban-Americans have held high office in Florida state politics and been instrumental in shaping United States foreign policy towards Cuba.<sup>39</sup> Also, Cuban-Americans have been dominant in the police department, county commissions, school boards and the Miami Mayor's Office.<sup>40</sup> Members of the Cuban-American community have been named United States Attorney and to the local bench, including the state supreme court.<sup>41</sup>

There are numerous reasons for that success. First, the economic ethnic enclave provides funding for elections. Cuban-American businessmen, professionals, and workers are mobilized and they form a cohesive bloc, united by anti-Castro politics. Second, historically, the Cuban-Americans had access to federal funding. In a

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<sup>38</sup> *Id.*

<sup>39</sup> Dario Moreno, *Exile Political Power: Cubans in the United States Political System*, <http://metropolitan.fiu.edu/downloads/exile%20political%20power.doc>.

<sup>40</sup> Ellen Sugarman, *A Miami Vision of Our Future?*, INSIGHT ON THE NEWS, Sept. 28, 1998.

<sup>41</sup> *Cuban American Named Florida Supreme Court Justice*, MIAMI HERALD, Jan. 3, 2009.

sense, money flows in both directions, from the enclave to the politicians and in reverse as well.<sup>42</sup>

The anti-Castro sentiment shared by the United States government and the Cuban-American community has cemented the enclave's influence:

Given encouragement from Washington, it is little wonder that local Hispanic politicians frequently seize opportunities to pledge support for anti-Communist foreign policies and to demonstrate their own fervor. During the sixteen-month period preceding May 1983, the Miami City Commission passed at least twenty-eight formal resolutions, ordinances, and motions dealing with U.S. foreign policy, most of which were strictly symbolic expressions of Latin anti-Communism. The Hialeah City Commission severed its Sister City association with Managua, Nicaragua, and the City of Sweetwater solemnly declared Fidel Castro *persona non grata*.<sup>43</sup>

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<sup>42</sup> Patrick J. Haney & Walt Vanderbush, *The Role of Ethnic Interest Groups in U.S. Foreign Policy: The Case of The Cuban American National Foundation*, INTERNATIONAL STUDIES QUARTERLY 2nd ser. 43, 1999, at 341-361; Kevin Sack, *Politics: Florida, with a Major Primary Nearing, Little Havana Is Beginning to Look a Lot Like a Giant*, NEW YORK TIMES, March 9, 1996; Evan Thomas & Mark Hosenball, *Cubans At the Wheel*, NEWSWEEK, Dec. 11, 2000; Laura Wides-Muñoz, *Candidates Work Harder for Cuban Vote*, NEW YORK TIMES, Jan. 25, 2008.

<sup>43</sup> Patrick J. Haney & Walt Vanderbush, *The Role of Ethnic Interest Groups in U.S. Foreign Policy: The Case of the Cuban American National Foundation*, INTERNATIONAL STUDIES QUARTERLY 2nd ser. 43, 1999, at 361.

Another scholar of the Cuban-American enclave notes:

Many Cuban-Americans see the Cuban issue as a litmus test for evaluating candidates for local office. "If you want to run for dog catcher," said a Cuban-American patrol at a sidewalk coffee stand, "you'd better take a hard-line position towards Cuba or you'll never get elected." While it may not be that extreme, it is true that Miami politics dances to a Cuban beat.<sup>44</sup>

What these examples demonstrate is the extent and degree to which the Cuban-American political enclave can dictate political agendas and decisions; this is the case in Miami, Hialeah, West Miami, Sweetwater and Coral Gables.<sup>45</sup> Given the intensity of the exile experience, the Cuban-American community has produced a society in a near-constant state of mass mobilization fueled by a widespread war mentality.<sup>46</sup> "Little Havana is no mere immigrant

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<sup>44</sup> Chris Girard & Guillermo Grenier, *Insulating an Ideology: The Enclave Effect on South Florida's Cuban Americans*, *HISPANIC JOURNAL OF BEHAVIORAL SCIENCES*, Vol. 30, No. 4, Nov. 2008, at 317.

<sup>45</sup> Mark F. Peterson & Jaime Roquebert, *Success Patterns of Cuban-American Enterprises: Implications for Entrepreneurial Communities*, *HUMAN RELATIONS*, Vol. 46, No. 8, 1993, at 921-937.

<sup>46</sup> Sandra Dalis Alvarez, *The Effects on an Ethnic Enclave as a Social Movement* (1994) (Unpublished Masters Thesis, Central Missouri University) (on file with Central Missouri University).

neighborhood, not even a lively business hub, but a moral community with its own distinct outlook on the world."<sup>47</sup> Sociologically, a moral community compels and coerces, in subtle and not-so-subtle ways.

If from the outside the exile's political discourse appeared as raving intolerance, from the inside it helped define who was and was not a true member of the community. To be a Miami Cuban, it does not suffice to have escaped from the island; one must also espouse points of view repeated ceaselessly by editorialists in Miami's Spanish radio and press – the same voices that take care of denouncing any member of the community who strays too far from the fold.<sup>48</sup>

The exile ideology has found numerous venues for expression besides explicit political speeches and

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<sup>47</sup> Alejandro Portes & Alex Stepick, *City on the Edge*, in THE CUBA READER: HISTORY, CULTURE, POLITICS 583 (Aviva Chomsky, Barry Carr & Pamela Maria Smorkaloff, eds., Duke University Press 2003). The concept of a *moral community* originates with Emile Durkheim and does not mean religious or ethical beliefs; rather Durkheim stresses the functional importance of *shared values* on a particular issue, shaping behavior and producing a high degree of social integration. EMILE DURKHEIM, THE SOCIOLOGICAL METHOD (New York Free Press 1938) (1895).

<sup>48</sup> Alejandro Portes & Alex Stepick, *City on the Edge*, in THE CUBA READER: HISTORY, CULTURE, POLITICS 583 (Aviva Chomsky, Barry Carr & Pamela Maria Smorkaloff, eds., Duke University Press 2003).

articles. It can be found in short stories, novels, books, films, plays, soap operas, documentaries and comic books. The exile ideology is a political and economic industry consciously shaping values and attitudes.<sup>49</sup> A 1981 study of university undergraduates in Florida used the Cuban government as a negative referent. The study found that "all Cuban American students may use their opposition to Castro's Cuba less as a way of defining themselves than as a way of indicating to others their solidarity with the mainstream of the exile community."<sup>50</sup> It was clear to the undergraduates that voicing the dominant ideology meant social acceptance as well as rewards.<sup>51</sup>

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<sup>49</sup> John D. Ribo, *A Nation Built On Nothing: Cuban American Subjectivities in Revolt*, M.A. (2007) (Unpublished Masters Thesis, University of North Carolina, Chapel Hill) (on file with University of North Carolina, Chapel Hill); Stacey Van Dahm, *Nationalism and Narratives of Subjectivity in the Cold War Imagery* (2007) (unpublished Ph.D. dissertation, University of California-Santa Barbara) (on file with University of California-Santa Barbara).

<sup>50</sup> Charles Carver, *Havana Daydreaming: A Study of Self-Consciousness and the Negative Reference of Groups Among Cuban-Americans*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, Vol. 40, No. 3, March 1981, at 545-552.

<sup>51</sup> Chris Girard & Guillermo Grenier, *Insulating an Ideology: The Enclave Effect on South Florida's Cuban Americans*, HISPANIC JOURNAL OF BEHAVIORAL SCIENCES, Vol. 30, No. 4, Nov. 2008, at 530-543.

**II. GIVEN THE PERVASIVE INFLUENCE OF THE CUBAN-AMERICAN EXILE IDEOLOGY IN MIAMI-DADE COUNTY, THE JURY COULD NOT HAVE OVERCOME THE PRESSURES NECESSARY FOR THESE DEFENDANTS, WHO WERE AGENTS OF THE CASTRO GOVERNMENT, TO HAVE HAD A FAIR TRIAL.**

The academic literature has shown that collective violence can be a form of social control with the specific purpose of forcing others to conform. The explicit social control can take many forms: taunts, insults, criticism, protests, vandalism, and arson, damage to property, physical assaults and even murder.<sup>52</sup> Miami's "volatile politics" has shown a predisposition to utilize such modes of social control, when deemed politically necessary. This has set the Miami-Dade enclave apart in its "modes of participation from those usually described for urban communities elsewhere."<sup>53</sup> Professor Lisandro Pérez writes:

Any dissent in Miami is especially difficult. The Cubans' pervasive influence in Miami means that great pressures can be brought to bear on the dissenting individual or group. Such pressures can be economic, political, or

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<sup>52</sup> Roberta Senechal de la Roche, *Collective Violence as Social Control*, SOCIOLOGICAL FORUM, Vol. 11, No. 1, March 1996, at 97-128.

<sup>53</sup> Christopher L. Warren, John F. Stack, Jr., & John G. Corbett, *Minority Mobilization in an International City: Rivalry and Conflict in Miami*, PS, Summer 1986, at 626.

social, but they have also involved the threat of violence. *There is a long history of threats, bomb scares, actual bombings, and even murders directed at persons who have dissented from the predominant anti-Castro positions or have demonstrated a perceived "softness" toward the regime.*<sup>54</sup> (Emphasis added).

The 1994 coordinator of the human rights group Americas Watch was surprised to discover that not a single agency was willing to prosecute threats and intimidation carried out by Cuban exiles in Miami. He said, "No one at the local, state or federal level has spoken out against the violence or threats against moderates."<sup>55</sup>

It would be reasonable to expect that since political disputes in the past have led to violence and intimidation, a case charging people with espionage and the downing of Miami-based airplanes would have produced major violent confrontations if the appellants had been found not guilty. The jurors would have been tagged "traitors" – the characterization applied to anyone who deviates from what the Miami political enclave demands. Intimidation has been justified by arguing that someone has not served Cuban-American political interests.

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<sup>54</sup> Professor Lisandro Pérez declaration, at 8-9. *Amici App.* at 32a.

<sup>55</sup> ANN LOUISE BARDACH, *CUBA CONFIDENTIAL: LOVE AND VENGEANCE IN MIAMI AND HAVANA* 116 (Random House 2002).



The political culture of the exiles is based on interpretations of social and political reality "dominated by the belief that one's opponent is treacherous. Political differences then turn into charges of betrayal. If a national or political aim is not attained, there is only [one] possible reason: treason or betrayal."<sup>56</sup>

In fact, from the very start, the *exilio histórico* considered that the United States government had betrayed the Cuban-American cause on numerous occasions. Just last December 19, 2008, a leading Cuban exile leader, Jose Ignacio Rasco, stated in an interview, "La traición de Estados Unidos nos hizo mucho daño. Aún sufrimos las consecuencias." ["United States treason has done us much harm. We are still suffering the consequences."]<sup>57</sup> The United States government, the exile ideology narrative goes, cannot be trusted. It is that fact that should be considered in assessing the profound and widespread influence of the Cuban-American enclave in Miami-Dade. The petitioners' case, consequently, fits into that very Cuban exile political narrative: The agents of the Castro government are spies, traitors within.

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<sup>56</sup> Nelson P. Valdés, *Cuban Political Culture: Between Betrayal and Death*, in *CUBA IN TRANSITION: CRISIS AND TRANSFORMATION* 217 (Sandor Halebsky & John M. Kirk, eds., Westview Press 1992).

<sup>57</sup> José Ignacio Rasco interview, <http://www.libertaddigital.com/opinion/victor-llano/fundador-de-la-democracia-cristiana-cubana-11919/>

In that framework, anyone who defends them is also a traitor. The jury, consequently, had to find against the "traitors" or be considered "traitors" themselves. The classification of treachery has serious consequences anywhere, but in Miami-Dade even more so. Not surprisingly, the traitor charge was attached to Janet Reno, the U.S. attorney general at the time. The Cuban-American organization Brothers to the Rescue opposed hearing any evidence provided by the Cuban government on matters related to exile terrorism; they claimed this was a move by the U.S. Attorney General to do something similar to the return of Elián González to Cuba.<sup>58</sup> Psychology Professor Gary Patrick Moran, from Florida International University, has exposed a profound existing bias in Miami against people associated with the Cuban government. Moreover, a legal psychologist, Kendra H. Brennan (an authority on questionnaires and trial proceedings), noted that Moran's survey "accurately reflects profound existing bias against those associated with the Cuban government in Miami-Dade County."<sup>59</sup>

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<sup>58</sup> On June 26, 2001, the new United States Attorney General met with leading figures of the Cuban-American enclave, including José Basulto. The following month, July 12, the Cuban-American National Foundation held a party to honor the FBI members involved in the case, including the head of the FBI in the Cuba-American enclave, Hector Pesquera.

<sup>59</sup> *United States v. Campa*, 459 F.3d 1121, 1141-42 (11th Cir. 2006) (en banc), *petition for cert. filed* (U.S. Jan. 30, 2009) (No. 08-897).

At the time of the trial in this case, the sentiment in Miami-Dade was becoming increasingly in favor of direct United States military action to overthrow the Cuban government. As Dr. Brennan noted, "there is an attitude of a state of war between the local Cuban community against Cuba" which had "spilled over into the rest of the community" and had a "substantial impact on the rest of the Miami-Dade community."<sup>60</sup> In fact, the time period between the defendants' arrest and jury deliberations coincided with the events surrounding Elián González which included mob-like conduct by those who purported to speak on behalf of all Cuban-Americans in Miami.

The empirical and anecdotal evidence of the conditions producing community bias and prejudice against the defendants in this matter is clear. The jurors as members of the community could not escape such influence. One unfriendly defense witness, José Basulto, explicitly stated that *defense counsel* was doing the work of Cuban intelligence.<sup>61</sup> In other words, the effort of the defendants' attorneys was construed as aiding and abetting the Cuban government and supporting communism. Such charges could negatively affect the jury as well as the defense counsel. On December 18, 2001, for example, Miami

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<sup>60</sup> *United States v. Campa*, 419 F.3d 1219, 1256 (11th Cir. 2005), *rehearing en banc* granted, *opinion vacated by* 429 F.3d 1011 (2005) and *aff'd on rehearing en banc*, 459 F.3d 1121 (2006), *petition for cert. filed* (U.S. Jan. 30, 2009) (08-897).

<sup>61</sup> *Id.* at 1240.

exile radio stations urged listeners to demonstrate at the home of Joaquin Mendez, one of the public defenders in the case.

Finally, *amici* adopt as its own the conclusion Professor Lisandro Pérez expressed in his testimony on October 19, 2002:

After having laid out the context and climate to the process of jury selection in this case, I will restate my two basic points, now evident: 1) in this case, pre-trial media coverage is an insufficient indicator of the depth of the community's pre-trial bias against the defendants; 2) selecting a non-Cuban jury does not counter that bias . . . Given the sociological forces unique to Miami-Dade, described above, I repeat my conclusion here: the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero.<sup>62</sup>

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<sup>62</sup> Professor Lisandro Pérez declaration, at 11-13. *Amici* App. at 35a-37a.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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### **Employment**

1972 Sociology Instructor, Latin American Studies, University of Glasgow, Scotland.  
1973-1976 History Instructor, University of New Orleans.  
1976-1980 Assistant Professor of Sociology, University of New Mexico.  
1980-1991 Associate Professor of Sociology, University of New Mexico.  
1991-2008 Full Professor of Sociology, University of New Mexico.  
2009- Emeritus Professor, University of New Mexico

**Visiting Appointments (Since 1998 - )**

2003-2004 Executive Director, Fundación Amistad, Duke University.

2003-2004 Visiting Professor, Department of Sociology, Duke University.

2003-2004 Assistant to the Vice Provost for International Affairs, Duke University.

**Administrative Experience (Since 1998 - )**

1999- Director, Program of Academic Research on Cuba, Latin American and Iberian Institute, University of New Mexico.

2003-2004 Executive Director, Fundación Amistad, Duke University

**Books Authored**

*The Cuban Revolution: A Research Study Guide*, UNM Press, 1971 (jointly with Edwin Lieuwen).

*Cuba, Socialismo Democrático o Burocratismo Colectivista?*, Bogotá: Editorial Tercer Mundo. 1973.

**Books Edited**

*Che: The Selected Works of Ernesto Guevara*, MIT Press, 1969.

*Revolutionary Struggle: The Selected Works of Fidel Castro*, MIT Press, 1970.

*Cuba in Revolution*, Anchor Books, 1972.



### Recent Chapters in Books (1998- )

"Los estudios cubanos en el exterior," in Rafael Hernández, editor, *Las Ciencias Sociales y los Estudios sobre Cuba*, Havana: Editorial Ciencias Sociales, 1999, chapter 4.

"The Political Economy of the Internet in Cuba" in *ASSOCIATION FOR THE STUDY OF THE CUBAN ECONOMY (ASCE) PROCEEDINGS*, Vol. 9, Miami: Florida International University, 2000, pp. 141-154 (with Prof. Mario A. Rivera, Department of Public Administration, UNM).

"Fidel Castro, Charisma and Santería: Max Weber Revisited," in Anton Allahar, ed. *Caribbean Charisma: Legitimacy and Political Leadership in the Era of Independence*, Ottawa, Canada: Ian Randle Publisher, 2001.

"Presidential Succession: Legal and Political Contexts and Domestic Players," in *Cuban Socialism in a New Century: Adversity, Survival, and Renewal*, Edited by Max Azicri and Elsie Deal University Press of Florida, 2004 (Chapter 12).

Revised chapter on Cuba. *In Latin America, Problems and Promise*, 4th Edition, edited by Jan Black. Denver, Colorado: Westview Press, 2004.

"Hay posibilidades de insertarnos en Internet?," Fermín Romero Alfau, ed. *Clic - Internet*, Havana: Editorial Pablo de la Torriente, 2003, pp. 265-281.

### **Recent Articles in Refereed Journals (1998- )**

"Milagros, delfines, orishás y la derecha cubano-americana: La significación de Elián González, *NUEVA SOCIEDAD* (Caracas, Venezuela), No. 168, July-August, 2000, pp. 14-23.

"Cuba y la tecnología de la información," *LA JIRIBILLA* (La Habana), August 6, 2003.

"Interneting": or Studying with the Other – Portal of the Americas – Organization of American Status (Washington, DC), December 2005.

"Interneteando": o estudiando con el exterior – Portal de las Américas – Organización de Estados Americanos (Washington, DC) – Diciembre 2005

"Internetando" ou estudando com o exterior - Portal Educacional das Americas, Organizacao dos Estados Americanos, Dezembro 2005.

"El contenido revolucionario y político de la autoridad carismática de Fidel Castro," *TEMAS* (Havana), 2008, No. 55, 4-17.

### **Other Professional Activities (1998 - )**

Discussant, United Nations, Economic Commission on Latin America, Seminar on the Economic Situation and Recent Social Policies in Cuba, Mexico City, December 2, 2003. Invited by Rebeca Grynsman, director of ECLAC.

Consultant on Cuba, MSN-NBC, 2003-2004.

2005-2008: Member of the Board of Directors of the National Hispanic Cultural Center (NHCC). Appointed by the Governor of the state of New Mexico. I will serve in that capacity for the next 4 years.

2003-2007: Member of the Editorial Board the Cuban social science publication: TEMAS. The department has copies of the most recent issues.

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### SELECTED PUBLICATIONS IN DISCIPLINE

#### BOOKS

- 2009      *Waves of Despair, Waves of Hope: Cuban Migration and the Rise of the Cuban-American Community.* University of Notre Dame Press. Forthcoming. With Lisandro Perez and Sung-ChangSung..
- 2003      *This Land is Our Land: Newcomers and Established Residents in Miami.* University of

California Press. 2003. With Alex Stepick, Max Castro, Marvin Dunn.

2002 *A Legacy of Exile: Cubans in the United States*. Allyn and Bacon. With Lisandro Perez. 2002.

1994 *Newcomers in the Workplace: Immigrants and the Restructuring of the U.S. Economy*, with Louise Lamphere and Alex Stepick. Temple University Press, 1994. Winner of the Conrad Arensberg Award, American Anthropological Association.

1993 *Employee Participation and Labor Law in the American Workplace*, with Ray Hogler, Colorado State University. Quorum/Greenwood Publishing Co., 1993.

1992 *Miami Now: Immigration, Ethnicity and Social Change*, edited volume, with Alex Stepick. University Press of Florida, 1992.

1988 *Inhuman Relations: Quality Circles, and Anti-Unionism in U.S. Industry*. Temple University Press. 1988.

# **SELECTED RECENT ARTICLES (\*Designates Peer Reviewed Manuscripts)**

2008 "Insulating Ideology: The Enclave Effect on South Florida's Cuban Americans" *Hispanic Behavioral Science Journal*. No. 30, 2008, p. 317.

- 2008 "Impact of the Embargo: Cleavages in the Ideology of South Florida's Cuban Americans." Accepted with revisions. *Latino Studies Journal*. Forthcoming.
- 2006\* "The More Things Change: The Creation, Maintenance and Persistence of the Cuban-Exile Ideology in Miami," *Journal of American Ethnic History*. Winter/Spring. 2006: 209-224.

### **SELECTED REPORTS, MONOGRAPHS AND ENCYCLOPEDIA ENTRIES**

- 2004 *The 2004 FIU Cuba Poll: Cuban-America in Transition: Research Report* with Hugh Gladwin. Institute for Public Opinion Research and The Cuban Research Institute, Florida International University, March 2004. Partially funded by The South Florida Sun-Sentinel.
- 2000 *The 2000 FIU Cuba Poll: Cuban-America in Transition: Research Report* with Hugh Gladwin and Lisandro Perez, Institute for Public Opinion Research and The Cuban Research Institute, Florida International University, October 2000. Funded by the Christopher Reynolds Foundation.
- 1998 "The Cuban American Experience," in *The Encyclopedia of American Cultures*, McMillan Publishing Company. 1998.
- 1997 *The 1997 FIU Cuba Poll: Politics, Cuba, and Cuban-Americans in Dade County: Research Report* with Hugh Gladwin, Institute for Public Opinion Research and The Cuban Research Institute, Florida International

University, June, 1997. Funded by the Miami Herald.

- 1995 *The 1995 FIU Cuba Poll: Politics, Cuba, and Cuban-Americans in Dade County: Research Report* with Hugh Gladwin and Doug McLaughen. Cuba Polls Research Report, Institute for Public Opinion Research and The Cuban Research Institute, Florida International University, May, 1995. Funded by the ARCA Foundation.
- 1993 *The 1993 FIU Cuba Poll: Politics, Cuba, and Cuban-Americans in Dade County: Research Report* with Hugh Gladwin and Doug McLaughen. Cuba Polls Research Report, Institute for Public Opinion Research and The Cuban Research Institute, Florida International University, August, 1993.
- 1992 *Views on Policy Options Toward Cuba Held by Cuban American Residents of Dade County, Florida: The Results of the Second Cuba Poll* with Hugh Gladwin and Doug McLaughen. Cuba Polls Research Report, Institute for Public Opinion Research and The Cuban Research Institute, Florida International University, October, 1991.
- 1991 *Immigration Reform and Ethnic Minorities: The Case of Florida and IRCA*. Research Monograph for the Department of Human and Rehabilitative Services, September, 1991.
- 1991 *Views on Policy Options toward Cuba Held by Cuban American Residents of Dade County, Florida* with Hugh Gladwin. Cuba Polls Research Report, Institute for Public Opinion



Research, Florida International University,  
March, 1991.

- 1990 *Changing Relations Among Newcomers and Established Residents: The Case of Miami With Alex Stepick, Max Castro and Marvin Dunn.* Research report submitted to Ford Foundation/Changing Relations Board, February 1990.
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J.A. Cobas and Jorge Duany, *Cubans in Puerto Rico*. Gainesville: University Press of Florida, 1997 (English language edition. Originally published in Spanish in 1995 by the University of Puerto Rico Press).

J.A. Cobas, Jorge Duany and J.R. Feagin (eds.), *How the United States Racializes Latinos: White Hegemony and Its Consequences* Paradigm Press, March, 2009.

Book to be released in 2010

J.A. Cobas (with Joe Feagin), *Guardians of Racialization*. Paradigm Press

#### **B. Selected Recent Articles**

R. Pérez-Escamilla, J.A. Cobas, H. Balcazar, and M. Benin. "Specifying the Antecedents of Breast-feeding

Duration in Peru Through a Structural Equation Model." *Public Health Nutrition*, 2 (1999):461-467.

K.R. Bush, G.W. Peterson, J.A. Cobas, and A.J. Supple. "Adolescents' Perceptions of Parental Behaviors as Predictors of Adolescent Self-Esteem in Mainland China." *Sociological Inquiry* 72(Fall, 2002):503-526.

Zhenchao Qian and J.A. Cobas. "Latinos' Mate Selection: Variations by National Origin, Race, and Nationality." *Social Science Research* 33 (June, 2004): 225-247.

G. Peterson, J.A. Cobas, K.R. Bush, A. Supple and S. Wilson. "Parent-Youth Relationships and the Self-esteem of Chinese Adolescents: Collectivism versus Individualism." *Marriage and Family Review* 36 (2004):173-200.

Sampson L. Blair and J.A. Cobas, "Gender Differences in the Adult Status Attainment of Latinos: Understanding Bilingualism in the Familial Context." *Family Relations* 55 (2006):292-305

J.A. Cobas and Joe R. Feagin, "Language Oppression and Resistance: Latinos in the United States." *Ethnic and Racial Studies*, 31 (February, 2008):390-410.

Joe R. Feagin and J.A. Cobas, "Latinos/as and the White Racial Frame: The Procrustean Bed of Assimilation," *Sociological Inquiry*, 78(February, 2008):39-53.

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**SELECTED RECENT PUBLICATIONS**

**1. Books**

*From Welcomed Exiles to Illegal Immigrants: Cuban Migration to the U.S., 1959-1995.* Rowman & Littlefield, (revised and expanded edition of *With Open Arms*) 1996

*Plebiscite: Puerto Rico At a Political Crossroad.* Co-editor with Héctor Vélez Guadalupe and Irma Almirall-Padamsee. Cornell University, 1991

*With Open Arms: Cuban Migration to the United States.* Rowman & Littlefield, 1988

## 2. Selected Peer Reviewed Articles and Essays:

"The Cuban Community in Florida," *Ethnicity in the American South*. James Thomas, ed. University of North Carolina Press, 2007

Encyclopedia essays: "Cuban Americans" and "Marielitos." Richard T. Schaefer, editor. *Encyclopedia of Race, Ethnicity, and Society*. SAGE publishers, 2007

"Bienvenidos a Guantánamo: Una perspectiva histórica." *Encuentro de la Cultura Cubana*. No. 36, Spring, 2005

Encyclopedia essays: "Cuban War of Independence; José Martí; Fidel Castro; Cuban Detainees (excludables); Marielitos; Balseros; Bay of Pigs Invasion; Cuban Embargo."

Deena J. González and Suzanne Oboler, editors. *Encyclopedia of Latinas and Latinos in the United States*. Oxford University Press, 2005

Encyclopedia essays: "Mariel Boatlift; Balseros Crisis." Ilan Stavans, editor. *Encyclopedia Latina: History, Culture, Society*. Grolier Publishers, 2005

"The Cuban Boatlift of 1980: Consequences of a Politicized Immigration Policy." *Dialogo*, No. 7, April, 2003: 25-30

**SELECTED RECENT SCHOLARLY PAPERS:**

"Past, Present and Future of Academic Exchanges Between the U.S. and Cuba" Conference: The U.S. and Cuba: Rethinking Reengagement, University of North Carolina, Chapel Hill, September 25-27, 2008

"U.S.-Cuba Relations in the 1990s: Looking Back and Moving forward." Research Conference: Cuba: New Research Directions. University of California, Irvine, May 2-3, 2008

"Cuba, el plan Bush y el futuro de los intercambios académicos entre EE. UU. Y Cuba" Conferencia: Cuba Contra el Bloqueo, La Habana, March 19-21, 2008

"Welcome to Guantánamo: The Balseros Crisis in Historical Perspective," Symposium: The Balseros Crisis Ten Years Later: No Longer Adrift? Florida International University, July 16 & 17, 2004

"Immigration and Freedom to Travel: The Case of Cuba and the U.S. in the Current Military and Political Climate," National Lawyers Guild Convention, Minneapolis, October 24, 2003

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**Selected Biography of Lourdes Arguelles, Ph.D.**

Born in Cuba and educated in the island and in the United States, Dr. Lourdes Arguelles is currently a full professor tenured in the School of Educational Studies and in the Department of Cultural Studies at Claremont Graduate University, a member of the Claremont Colleges Consortium in Southern California. She teaches courses and does trans-disciplinary research in the areas of immigrant community studies, conflict resolution, and neuro-scientific and contemplative perspectives in teaching, counseling, and learning. She is also a licensed psychotherapist in the State of California who works primarily and pro-bono with survivors of political and domestic violence and cult abuse as well as with Latino immigrant families.

Dr. Arguelles received her Ph.D. in Education from the Center for Human Relations and Community Studies at New York University. Her doctoral areas of concentration were Psychology and Sociology and her dissertation was entitled: "Cuban Political Refugees in the United States: A Study of Social Mobility and Authoritarianism". She also holds a M.S. degree in Counseling from Barry University in North Miami, Fla. and a B.A. in Economics from the University of Miami, where she also did graduate work in Psychology and Education. Dr. Arguelles also received a Certificate in Law and Psychiatry from York University, Ontario, Canada and was a post-doctoral scholar in Comparative Ethnic Studies at the Chicano Studies Center of the University of California



in Los Angeles. In addition, she spent a year in India, mostly at the Library of Tibetan Works and Archives in Dharamsala and the Gandhi Peace Foundation in New Delhi, researching the potential use of Eastern contemplative traditions and approaches to conflict resolution for work in schools and communities in the United States.

Before her tenure at Claremont Graduate University, Dr. Arguelles occupied the Mac Arthur Chair in Women Studies at Pitzer College in Claremont, California and a Professor of Chicano/Latino Studies. She has been a full-time faculty member in Departments of Psychology, Sociology, Social Work, and Medicine at different institutions such as Loyola College (Montreal), University of Waterloo (Ontario), University of British Columbia, University of New Mexico, Arizona State University, and the University of California, Los Angeles. During these years her teaching and research focus was on the Cuban émigré experience and on the dynamics of conflict in immigrant and working-class communities.

Dr. Arguelles has also been Research Director for the Department (now Ministry) of Human Resources of the British Columbia Provincial Government in Canada and a research and evaluation consultant for AIDS Project Los Angeles, the National Institute of Drug Abuse, LEARN, and the National Institutes for Mental Health among many international, national, and regional governmental and private institutions. Recently, she was Co-Principal Investigator of a neuro-science and contemplative-based teaching

program funded by a major U.S. Congressional grant. The program was designed to reduce the stress and improve the cognitive performance of high-school students in inner cities schools in Florida, California, Texas, New York, and Washington, D.C..

In the last ten years, Dr. Arguelles has directed several award-winning community learning and teacher training programs based in Latino immigrant and U.S.-Mexico Border enclaves . These programs, most of which are still operating, have been funded by more than two million dollars of grants from the U.S. Department of Housing and Urban Development, Atlantic Philanthropies, and the Jacobs and Weingart Foundations. While directing these community-based projects, Dr. Arguelles continued and expanded her research into immigrant everyday life and conflict dynamics, work which has been published in academic and popular journals around the world.

The mother of three grown Cuban American children, Dr. Arguelles lives in Southern California. She can be reached through her office at the School of Educational Studies, Claremont Graduate University, Claremont, California 91711.

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## SELECTED BIOGRAPHY OF RUBÉN G. RUMBAUT

**Rubén G. Rumbaut** is Professor of Sociology at the University of California, Irvine. A native of Havana, Cuba, he received his Ph.D. in Sociology from Brandeis University in 1978. Dr. Rumbaut was a Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford in 2000-01, and a Visiting Scholar at the Russell Sage Foundation in New York City in 1997-98. He is the Founding Chair of the Section on International Migration of the American Sociological Association, and an elected member of the ASA's Council and of the Sociological Research Association. He is a member of the Committee on Population of the National Academy of Sciences, the Committee on International Migration of the Social Science Research Council, and the MacArthur Research Network on Transitions to Adulthood and Public Policy.

An internationally known scholar of immigration and refugee movements, and a leading expert on immigration in the United States who has testified before the U.S. Congress at hearings on comprehensive immigration reform, Dr. Rumbaut co-directs the landmark *Children of Immigrants Longitudinal Study* (CILS), begun in 1991; and a large-scale study of *Immigration and Intergenerational Mobility in Metropolitan Los Angeles* (IIMMLA). He directed the first *National Survey of Immigration Scholars* in the United States, which generated new knowledge about the social origins and intellectual formation of the

multidisciplinary field of international migration studies. Throughout the 1980s he directed the principal studies of the migration and incorporation of refugees from Vietnam, Laos, and Cambodia – the *Indochinese Health and Adaptation Research Project* and the *Southeast Asian Refugee Youth Study*. He has traveled to Vietnam and Cambodia, and earlier to Sierra Leone, where he organized a field project on international health and economic development. In the 1990s, he served as academic advisor for a prime-time 10-part PBS television series, *Americas*, focusing on Latin American and Caribbean societies, as well as on Mexicans, Cubans and Puerto Ricans in the United States.

Professor Rumbaut is the author of more than one hundred scientific articles and chapters in scholarly volumes on the adaptation of immigrants and refugees in the United States. His research has focused on types of immigrants and refugees and their contexts of exit and reception, intergenerational differences in adaptation, crime and incarceration, bilingualism and language loss, ethnic identity, citizenship and national membership, infant health and mortality, fertility, depression, self-esteem, educational achievement and aspirations, social mobility and inequality, modes of acculturation, and paradoxes of assimilation. His books include the critically acclaimed *Immigrant America: A Portrait* (with Alejandro Portes; new ed. 2006); *Immigration Research for a New Century: Multidisciplinary Perspectives* (with Nancy Foner and Steven J. Gold);

*Origins and Destinies: Immigration, Race and Ethnicity in America* (with Silvia Pedraza); and *California's Immigrant Children: Theory, Research, and Implications for Educational Policy* (with Wayne Cornelius). He has published two companion books based on CILS (with Alejandro Portes): *Ethnicities: Children of Immigrants in America*, and *Legacies: The Story of the Immigrant Second Generation*, the latter of which won the American Sociological Association's top award in 2002 for Distinguished Scholarship, as well as the 2002 Thomas and Znaniecki Award for best book in the immigration field.

As a member of a panel of the National Academy of Sciences (with Marta Tienda *et al.*) he worked on two companion volumes on the Hispanic population of the United States, recently published by the National Academies Press: *Multiple Origins, Uncertain Destinies*; and *Hispanics and the Future of America*. He also edits (with Steven J. Gold) a research-oriented book series, "*The New Americans: Recent Immigration and American Society*" (LFB Scholarly Publishing, New York); under their editorship more than four dozen titles have been published since 2002 on a wide range of immigration topics.

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## Selected Biography of Louis A. Pérez, Jr.

J. Carlyle Sitterson Professor    xxx xxx xxx  
 Department of History    xxx xxx, xxx xxx  
 University of North Carolina    xxx-xxx-xxxx  
 Chapel Hill, NC 27599  
 919-962-3943  
 perez@email.unc.edu

### Education

New York University, 1961-1962  
 Pace College, 1962-1965    B.A.  
 University of Arizona, 1965-1966    M.A.  
 University of New Mexico, 1966-1971    Ph.D.

### Professional Association Memberships

American Historical Association  
 Latin American Studies Association  
 Conference on Latin American History  
 Association of Caribbean Historians  
 Association of Third World Studies

### Recent Publications: Books

*Cuba: Between Reform and Revolution.* New York: Oxford University Press, 1988; Second edition, 1995; Third edition, 2006.  
*Cuba and the United States: Ties of Singular Intimacy.* Athens, Ga.: University of Georgia Press, 1990; Second edition, 1997; Third edition, 2003.  
*Essays on Cuban History: Historiography and Research.* Gainesville, Fla.: University of Florida Press, 1995.

- The War of 1898: The United States and Cuba in History and Historiography.* Chapel Hill: University of North Carolina Press, 1998.
- On Becoming Cuban: Identity, Nationality and Culture.* Chapel Hill: University of North Carolina Press, 1999.
- Winds of Change: Hurricanes and the Transformation of Nineteenth-Century Cuba.* Chapel Hill: University of North Carolina Press, 2001.
- Tampa Cigar Workers.* Gainesville: University of Florida Press, 2002. (With Robert P. Ingalls)
- Los Archivos de Cuba/The Archives of Cuba.* Pittsburgh: University of Pittsburgh Press, 2003. (Co-edited with Rebecca J. Scott)
- To Die in Cuba: Suicide and Society.* Chapel Hill: University of North Carolina Press: 2005.
- Cuba in the American Imagination: Metaphor and the Imperial Ethos.* Chapel Hill: University of North Carolina Press, 2008.

#### Recent Publications: Articles

- "The Circle of Connections: One Hundred Years of Cuba-U.S. Relations," *Michigan Quarterly*, XXIII (Summer 1994), 437-455.
- "Between Baseball and Bullfighting: The Quest for Nationality in Cuba, 1868-1898," *Journal of American History*, LXXXI (September 1994), 493-517.
- "1898 and Beyond: Historiographical Variations on War and Empire," *Pacific Historical Review*, LXV (May 1996), 313-316.
- "Identidad y nacionalidad: Las raíces del separatismo cubano, 1868-1898," *Op. Cit. Revista del Centro de Investigaciones Históricas* (Río Piedras, P.R.), IX (1997), 185-195.



- "Between Meanings and Memories of 1898," *Orbis*, XXXXII (Fall, 1998), 507-516.
- "Incurring a Debt of Gratitude: 1898 and the Moral Sources of United States Hegemony in Cuba," *The American Historical Review*, CIV (April 1999), 356-398.
- "Fear and Loathing of Fidel Castro: Sources of U.S. Policy Toward Cuba," *Journal of Latin American Studies*, XXXIV(May 2002), 227-254.
- "We Are the World: Internationalizing the National, Nationalizing the International," *Journal of American History*, LXXXIX (September 2002), 558-566.
- "Between Encounter and Experience: Florida in the Cuba Imagination," *Florida Historical Quarterly*, LXXXII (Fall 2003), 170-190.
- "In the Shadow of the Winds: Rethinking the Meaning of Hurricanes," *ReVista*, 5 (Winter 2007), 10-12.
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## DECLARATION BY LISANDRO PÉREZ

1. I am a Professor of Sociology and Anthropology and Director of the Cuban Research Institute at Florida International University, Miami's senior institution of public higher education.

2. I have lived in Miami for 27 years, first from 1960 to 1970, immediately after arriving from Cuba, and then from 1985 to the present. Most of my work during the past 15 years has involved applying my knowledge of Cuba and Cuban Americans to an understanding of the dynamics of this community. My entire academic career has been devoted almost exclusively to the study of Cuban society, Cuban migration, and the development of Cuban communities in the U.S., especially Miami. My first research project was my M.A thesis, which focused on Cuban demographics, and was completed at the University of Florida in 1972. I received my PhD in Sociology from that institution in 1974.

3. Since then, I have published numerous articles, chapters, edited books and other writings on Cuba and on Cuban Americans. I am co-author of a forthcoming (November 2002) book to be published by Allyn & Bacon entitled: *The Legacy of Exile: Cubans in the United States*. I am the Editor-in-Chief of a comprehensive encyclopedia on Cuba to be published by Macmillan Reference, and I have served since 1999 as the Editor of *Cuban Studies*, the oldest and most prestigious academic journal in the field. For

further reference on my credentials, please see my curriculum vita, attached.

4. The appellants' attorney, Leonard I. Weinglass, has asked me to bring my expertise to bear on the issue of the likelihood of selecting in Miami-Dade County an impartial jury to render a verdict in a case involving acknowledged agents of the Cuban government. This statement summarizes my expert opinion on that issue and only on that issue. I do not have a position on the guilt or innocence of the appellants.

5. Prior to having been contacted by Mr. Weinglass in October of 2002, I had no involvement in this case. My knowledge of it was limited to newspaper and other media accounts. Since being contacted by Mr. Weinglass, we have held one conversation on the case prior to my drafting this statement and I have also read transcript references provided to me of the selection process of the jury that originally convicted the appellants and of the questioning of prospective jurors. I used those references along with the leading sources on the dynamics of Miami and the Cuban American community, most of which are listed at the end of the statement.

6. Let me state at the outset my conclusion, which I will develop and substantiate in the rest of this statement: the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case involving acknowledged agents of the Cuban government is virtually zero. I would reach that

conclusion even if the jury were composed entirely of non-Cubans, as it was in this case.

7. To understand this conclusion, it is important to keep in mind that the usual approaches for determining and countering the influence of community bias on the process of jury selection are of limited applicability in this case. In determining bias, extensive pre-trial media coverage unfavorable to defendants is usually the most common indicator and represents the foremost argument for changing the venue.

8. In this case, pre-trial media coverage is an insufficient indicator of the depth of the community's pre-trial bias against the defendants. And selecting a non-Cuban jury does not counter that bias. Most of the remainder of this statement involves explicating and substantiating those two related points.

9. First, it is important to keep in mind that persons of Cuban birth or descent represent the largest single racial/ethnic/national origin group in Miami-Dade County. According to the 2000 U.S. Census of Population and Housing, in the county there are more persons of Cuban birth or descent (650,600) than there are white non-Hispanics (465,770), more than African-Americans (427,140), and more than all the other Hispanic nationality groups combined (641,130). Two every seven people in Greater Miami is a Cuban. It is not just one more immigrant group in the city's race/ethnic mosaic. It is

the largest group, period, among immigrants or nonimmigrants alike.

10. It was therefore to be expected that more than twenty percent of the jury pool be of Cuban birth or descent. Nor is it surprising that several non-Cubans in that pool had some personal ties with Cubans somehow involved in the case. In purely demographic terms, therefore, the Cuban presence in Miami-Dade is sizable and pervasive.

11. The importance of that presence, however, is based on much more than just demographics. In social, political, and economic terms Cubans exert an influence in Miami-Dade County that extends well beyond the Cuban community itself. Those who arrived from Cuba in the 1960s established the bases of that community. They were disproportionately drawn from the upper sectors of Cuban society. Many were professionals or entrepreneurs and had university degrees. A significant proportion had previous business experience, and more than a few had contacts with U.S. companies that had done business with Cuba before the revolution. Furthermore, their migration was facilitated by the U.S. government, which gave them entry as refugees and provided them with economic assistance.

12. Those earlier and privileged exiles eventually established in Miami what is regarded as the foremost example in the United States of a true ethnic enclave. An ethnic enclave is a strong ethnic community that is organized around a highly

differentiated range of enterprises and institutions, which serve, and profit from, the community. At the core of the enclave is entrepreneurship. Already by the 1990s, 42 percent of all enterprises in Miami-Dade County were Hispanic-owned, and three-quarters of those were Cuban-owned, generating far more revenue than Hispanic-owned businesses elsewhere in the U.S. The range of that entrepreneurship is impressive. The variety of sales and services controlled by Cubans, as well as their penetration into the professions, is so extensive that it is argued that it is possible for Miami Cubans to live entirely within their own community. One of the economic benefits of the enclave is the multiplication of social networks. The dense social networks of Cuban Miami provide a tremendous asset by which members of the community can advance their agenda of upward mobility for themselves and, especially, for their children. The enclave has provide the springboard, through experience and education, for the entry of many Cubans into the upper-management ranks of the largest institutions and organizations in Miami-Dade County, both private and public.

13. The economic clout of Cubans in Miami has been matched by their political influence. Few U.S. immigrant groups have attained electoral representation and political empowerment as rapidly as Cubans in Miami. During the 1980s Cubans in Miami established pivotal local power, exercised through the increasing number of elected officials and such organizations as the Cuban American

National Foundation, the Latin Builders Association, the Hispanic Builders Association, and the Latin Chamber of Commerce. The size of the Cuban community in Greater Miami and its fairly high turnout rates during elections produced a boom in the number of Cubans in elected positions at all levels of government. By the late 1980s, the City of Miami had a Cuban-born mayor, and the city manager and the county manager were both Cubans. Cubans controlled the City Commission and constituted more than one-third of the Miami-Dade delegation to the State legislature. Ileana Ros-Lehtinen, a Cuban, won election to the U.S. House of Representatives in 1989. By the 1990s Cuban-Americans were mayors of the incorporated areas of Miami, Hialeah, Sweetwater, West Miami, and Hialeah Gardens, all within Miami-Dade. Cubans comprise a majority in the commissions or councils of those cities. When the 1990s began there were already ten Cubans in the Florida Legislature, seven in the House and three in the Senate. Ros-Lehtinen was joined by another Cuban, Lincoln Diaz-Balart, in the U.S. Congress during the 1992 election cycle. By the beginning of the twenty-first century, six of the thirteen Miami-Dade County commissioners are Cuban, as is the mayor, Alex Penelas. Cubans head the two largest institutions of higher education in the county. Nowhere else in America, nor even in American history, have first generation immigrants so quickly, or so thoroughly, appropriated political power.



14. The pervasiveness of the Cubans' political and economic influence means that their priorities and agenda also take center stage in Miami. Cubans and their culture set the pace. David Rieff, a New Yorker who has written on Miami, has noted that Cubans have largely succeeded in taking "atmospheric control" of the city (*Going to Miami*, 1987, p. 143).

15. It was inevitable that Cubans would inject into the atmosphere of Miami their most overriding concern: the ongoing struggle for the recovery of their homeland. An identity as exiles is a central theme of the ethos of Cuban Americans, contributing to a particularly "Cuban" way of looking at the social and political environment. This vision is the "exile ideology" and it has three principal characteristics: 1) the primacy of the homeland; 2) uncompromising hostility towards the Cuban government; and 3) a passionate attachment to their ideology and intolerance to contrary views.

16. In the exile ideology, the desire to recover the homeland is the focus of political discourse and the source of mobilization in the Cuban American community. During the past forty years there has been a protracted continuation of the intense conflict that occurred in the early 1960s, when the Cuban government was entrenching itself against the serious attempts by the U.S. government and some sectors of Cuban society to overthrow it. For many Cubans who "lost" that conflict and went into exile,

the struggle has not ended, and they have tried, with amazing success, to keep the conflict alive.

17. The goal of the Cuban exile is the overthrow of Fidel Castro, and this is to be accomplished through hostility and isolation. Energizing that struggle is the highly emotional nature of the exile ideology.

18. The least favorable side of emotionalism and irrationality is intolerance to views that do not conform to the predominant "exile" ideology of an uncompromising hostility towards the Cuban government. Those inside or outside the community who voice views that are favorable or even "soft" or conciliatory with respect to Castro are usually subject to criticism and scorn, their position belittled and their motives questioned. Any dissent in Miami is especially difficult. The Cubans' pervasive influence in Miami means that great pressures can be brought to bear on the dissenting individual or group. Such pressures can be economic, political, or social, but they have also involved the threat of violence. There is a long history of threats, bomb scares, actual bombings, and even murders directed at persons who have dissented from the predominant anti-Castro positions or have demonstrated a perceived "softness" toward the regime. In addition to the indisputable record of this, I can attest to the veracity of it through personal experience. Based upon information at their disposal, the FBI deemed it necessary to place my home under protective surveillance for several days in October 1989. During those days an international

academic conference I helped to organize was convening in Miami. The Cuban community vilified the conference (and all those connected with it) simply because academics from Cuba were in attendance.

19. Many Cubans and non-Cubans who have dissented from the hardline stance of hostility to the Cuban government have felt such pressures. Even institutions outside of the Cuban community are wary of not making statements or holding activities (such as inviting artists from Cuba) that would evoke the displeasure of the leadership of Cuban American leaders. Even *The Miami Herald*, the only daily English-language newspaper, started moving, both editorially and in its coverage, in the direction of courting the support of the Cuban community. Despite its liberal tradition, *The Herald* is now one of the very few of the major newspapers in the U.S. that favors a hardline policy towards Cuba, including the embargo on the island. This is highly significant, for it means that the exile agenda and discourse has found resonance and support in the principal print media of non-Cubans in Miami, serving to spread the exile message outside the community.

20. By the 1990s it appeared that perhaps the stridency, militancy, and intolerance among Cuban Americans might be waning with the passage of time. But two events served to reenergize the traditional exile ideology and create a climate in Miami that is of special relevance to the venue issue in this case.

21. One of those events, on February 24, 1999, was the downing by Cuban military jets of two civilian aircraft piloted by Cuban Americans. It was an event that caused outrage in both the community and the local press and rekindled the strident anti-Castro sentiment and discourse in Miami. The reaction to the incident was uniform throughout Miami as both Cubans and non-Cubans stood united in their outrage and condemnation of the Cuban government. The prosecutors tied this important event to this case.

22. The other event started on Thanksgiving Day, 1999, when a six-year-old boy, Elián González, was found floating on an inner tube off the coast of Florida, and ended with the return of the boy to his father less than a year before this trial opened.

23. The Elián affair energized most of the Cuban American community, even younger generations who had not been previously active in the exile agenda. From the beginning of the Elián saga, the predominant voices among Cuban Americans defined the situation as a battle with Fidel Castro over a trophy, a trophy they were determined not to lose. During forty years Fidel Castro may have triumphed over the exiles by retaining power in Cuba, but he was not, the exiles vowed, going to win this battle. The child was in their hands, in "their" city, a city where they had triumphed, a city they "controlled." Even at the federal level, there was reason to be confident: the U.S. government had always proved willing to accommodate the exiles' agenda of combating Fidel Castro.

24. The 1996 shoot-down and the Elián saga served to reassure many Cubans, and remind many non-Cubans, that the exile ideology, complete with its emotionalism, irrationality, and intolerance, was still alive in Miami.

25. After having laid out the context and climate to the process of jury selection in this case, I will restate my two basic points, now evident: 1) in this case, pre-trial media coverage is an insufficient indicator of the depth of the community's pre-trial bias against the defendants; 2) selecting a non-Cuban jury does not counter that bias.

26. It is evident from the foregoing discussion that an overwhelming community bias against defendants who acknowledged being agents of the Cuban government is something that runs much deeper in Miami than unfavorable pre-trial publicity. Any evidence presented of such publicity would only be the tip of the iceberg. Miami has lived with anti-Castroism for forty years; it is part of the "atmosphere" that Cuban Americans have created in the city. In what other city in the U.S. would not one of the 164 jurors questioned publicly acknowledge a favorable impression of Cuba, with only three reporting a "balanced" view?

27. Evidently, the expression of such views was by no means limited to Cuban Americans, consistent with the analysis I have presented in this statement. The exiles' anti-Castro agenda is at the forefront of the political discourse in Miami. Even the most

important English-language daily newspaper resonates with it. The style of that agenda is passionate and intolerant. If non-Cubans did not know that before the Elián case, they learned it then. Non-Cubans may publicly express such strong anti-Castro views because they sincerely hold them as a result of their local political climate, or because they may feel intimidated or pressured into voicing such views. They may also feel compelled to remain silent.

28. It is undoubtedly the case that all those in Miami who disagree with the predominant exile views, Cubans or non-Cubans, do not feel compelled to publicly remain silent or conform. Indeed, some did express dissenting views on the fate of Elián and many more have expressed dissenting views on current U.S. policy. But this case is not about the appropriate U.S. policy towards Cuba. It is not even about the custody of a child. This case is about people accused by the U.S. government of spying for Fidel Castro and of helping to perpetrate a violent act that resulted in deaths and was widely condemned in the community. The 1996 shutdown was uniformly repudiated in Miami. If Cubans and non-Cubans in Miami have felt uncomfortable dissenting even in the Elián case, we can be sure that dissenting in this case approaches a taboo, a position that no one would want to take, or even appear to take.

29. Given the sociological forces unique to Miami-Dade, described above, I repeat my conclusion here: the possibility of selecting twelve citizens of Miami-Dade County who can be impartial in a case

involving acknowledged agents of the Cuban government is virtually zero.

I HEREBY DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNED THIS 19th DAY OF OCTOBER OF 2002 AT MIAMI FLORIDA

/s/ Lisandro Pérez ID FL DL P620534490630  
Professor

/s/ Harriet M. Ranallo 10/19/02  
Under oath administered by  
Notary Public

[SEAL] OFFICIAL [Illegible]  
HARRIET M RANALLO  
COMMISSION NUMBER  
DD 054325  
MY COMMISSION EXPIRES  
SEPT. 22, 2005

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**ATTACHMENT A**

**Curriculum vita, Lisandro Pérez**

Vita

September 2002

**LISANDRO PEREZ**

Born February 23, 1949, La Habana, Cuba; U.S. citizen

**Professor  
Sociology and  
Anthropology**

**Director  
Cuban Research  
Institute**

**Florida International University  
Miami, Florida**

DM 364, University Park  
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Miami, FL 33199  
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***Professional positions:***

At Florida International University:

Associate Professor, Sociology and Anthropology  
(1985-present)

Director, Cuban Research Institute  
(1991-present)

Chairperson, Department of Sociology and  
Anthropology (1985-1991)

Director, M.A. Program in International Studies  
(1986-1988)

At Louisiana State University:

Associate Professor, Sociology, 1978-1985

Assistant Professor, Sociology, 1974-1978

Acting Chair, Sociology and Rural Sociology,  
1984-1985

Coordinator of Graduate Studies, Sociology,  
1979-1984

Full Member of the Graduate Faculty, 1982-1985

Associate Member of the Graduate Faculty,  
1975-1982

***Degrees:***

**Ph.D. University of Florida, August 1974.**

**Sociology.**

Minor: Latin American Studies. Dissertation title: "An Analysis of the Migrant Population of Bogota, Colombia." Major professor: T. Lynn Smith.

**M.A. University of Florida, December 1972.**

**Sociology.**

Minor: Anthropology. Thesis title: "The Growth of the Population of Cuba, 1953-1970." Major professor: John Saunders.

**B.A. University of Miami, June 1970.**

Major field: Sociology. Minor fields: English and Spanish

**PUBLICATIONS**

***Books:***

forthcoming (2003)

Guillermo Grenier and Lisandro Pérez. *The Legacy of Exile: Cubans in the United States*. Allyn & Bacon (New Immigrants Series).

***Edited books and journals:***

in progress (under contract)

Lisandro Pérez, Editor-in-Chief. *The Encyclopedia of Cuba*. New York: Macmillan Reference USA (apprx. 650 pages, 400 entries).

2002

Lisandro Pérez, editor. *Cuban Studies*, vol. 33 Pittsburgh: University of Pittsburgh Press. Forthcoming.

2001

Lisandro Pérez, editor. *Cuban Studies*, vol. 32 Pittsburgh: University of Pittsburgh Press. 223 pp.

2000

Lisandro Pérez, editor. *Cuban Studies*, vol. 31. Pittsburgh: University of Pittsburgh Press. 219 pp.

1999

Lisandro Pérez, editor. *Cuban Studies*, vol. 30. Pittsburgh: University of Pittsburgh Press. 193 pp.

***Academic articles in serial publications:***

2001

Lisandro Pérez. "La emigración y la crisis estructural de la República." *Temas* (La Habana), no. 24-25 (January-June).

1999

Lisandro Pérez. "De Nueva York a Miami: El desarrollo demográfico de las comunidades cubanas en Estados Unidos." *Encuentro* (Madrid), vol. 15 (winter), 13-23.

1995

Lisandro Pérez. "The Population of Cuba: The Growth and Characteristics of its Labor Force." *Columbia Journal of World Business*, vol. 30, no. 1 (Spring), 58-65.

1994

Lisandro Perez. "The Household Structure of Second-Generation Children: An Exploratory Study of Extended Family Arrangements." *International Migration Review*, vol. 28, no. 4 (Winter), 736-747.

1990

Lisandro Pérez. "The 1990's: Cuban Miami at the Crossroads." *Cuban Studies/Estudios Cubanos*, vol. 20, 3-9.

1986

Lisandro Pérez. "Cubans in the United States." *The Annals of the American Academy of Political and Social Science*, vol. 487 (September), 126-137.

1986

Lisandro Pérez. "Immigrant Economic Adjustment and Family Organization: The Cuban Success Story Reexamined." *International Migration Review*, vol. 20, no. 1 (Spring), 4-20.

1985

Lisandro Pérez. "The Cuban Population of the United States: The Results of the 1980 U.S. Census of Population." *Cuban Studies/Estudios Cubanos*, vol. 15, no. 2 (Summer), 1-18.

1984

Lisandro Pérez. "The Political Contexts of Cuban Population Censuses, 1899-1981." *Latin American Research Review*, vol. 19, no. 2, 143-61.

1983

Lisandro Pérez. "The Holdings of the Library of Congress on the Population of Cuba." *Cuban Studies/Estudios Cubanos*, vol. 13, no. 1 (Winter), 69-76.

1982

Lisandro Pérez. "Iron Mining and Socio-Demographic Change in Eastern Cuba, 1884-1940." *Journal of Latin American Studies*, vol. 14, part 2 (November), 381-405.

1982

Sergio Diaz-Briquets and Lisandro Pérez. "Fertility Decline in Cuba: A Socioeconomic Interpretation." *Population and Development Review*, vol. 8, no. 3, 513-37.

1982

Thomas D. Boswell, Guarione M. Diaz, and Lisandro Pérez. "Socioeconomic Status of Cuban Americans." *Journal of Cultural Geography*, vol. 3, no. 1 (Fall/Winter), 29-41.

1980

Lisandro Pérez and Maisy L. Cheng. "The Revival of Population Growth in Nonmetropolitan America: The Exception of Louisiana." *Southern Studies*, vol. 14, no. 2 (Summer), 193-210.

1979

Lisandro Pérez. "The Human Ecology of Rural Areas: An Appraisal of a Field of Study with Suggestions for a Synthesis." *Rural Sociology*, vol. 44 (Fall), 584-601.

1977

Lisandro Pérez. "The Demographic Dimensions of the Educational Problem in Socialist Cuba." *Cuban Studies/Estudios Cubanos*, vol. 7, no. 1 (January), 33-57.

**Chapters in multi-authored works:**

2001

Lisandro Pérez. "Growing Up in Cuban Miami: Immigration, the Enclave, and New Generations." In *Ethnicities: Children of Immigrants in America*, edited by Rubén Rumbaut and Alejandro Portes. Berkeley: University of California Press and Russell Sage Foundation Press.

1999

Lisandro Pérez. "The End of Exile? A New Era in U.S. Immigration Policy Toward Cuba." Chapter 11 of *Free Markets, Open Societies, Closed Borders?* Edited by Max J. Castro. Miami: North-South Press.

1999

Guillermo Grenier and Lisandro Pérez. "Cubans." In *A Nation of Peoples: A Sourcebook on America's Multicultural Heritage*. Edited by Elliott Robert Barkan. Westport, Connecticut: Greenwood Publishing Group, Inc.

1998

Guillermo J. Grenier and Lisandro Pérez. "Refugees to Immigrants: The Rise of the Cuban American Community in Miami." In *Many Americas: Critical Perspectives on Race, Racism, and Ethnicity*, edited by Gregory R. Campbell. Dubuque, Iowa: Kendall/Hunt Publishing Company.

1998

Lisandro Pérez. "Florida's Hispanics and the State's Political Process." In *Amid Political, Cultural and Civic Diversity: Building a Sense of Statewide Community in Florida*, edited by Lance deHaven-Smith and David Colburn. Dubuque, Iowa: Kendall/Hunt Publishing Company.

1996

Lisandro Pérez. "The Households of Children of Immigrants in South Florida: An Exploratory Study of Extended Family Arrangements." In *The New Second Generation*, edited by Alejandro Portes. New York: Russell Sage Foundation.

1996

Guillermo J. Grenier and Lisandro Pérez. "Miami Spice: The Ethnic Cauldron Simmers." In *Origins and Destinies: Immigration, Race, and Ethnicity in America*, edited by Silvia Pedraza and Rubén G. Rumbaut. Belmont, California: Wadsworth Publishing Company.

1996

Lisandro Pérez. "Treinta años no son nada: La estabilidad y el cambio en la cultura política de los emigrados cubanos en los Estados Unidos." In *Razón y pasión: Veinticinco años de estudios cubanos*, edited by Leonel de la Cuesta and Maria Cristina Herrera. Miami: Ediciones Universal.

1994

Lisandro Pérez. "Cuban Catholics in the United States." Part II (pp. 145-247) of *Puerto Rican and Cuban Catholics in the U.S., 1900-1965*, edited by Jay P. Dolan and Jaime R. Vidal. Notre Dame: University of Notre Dame Press.

1993

Lisandro Pérez. "Cuban Families in the United States." *Minority Families in the United States: A Multicultural Perspective*, edited by Ronald L. Taylor. Prentice-Hall.



1992

Lisandro Pérez. "Cuban Miami." *Miami Now!*, edited by Guillermo Grenier and Alex Stepick. Gainesville: University Presses of Florida.

1988

Lisandro Pérez. "Adaptación económica del inmigrante y organización familiar: revisión del éxito cubano." In *Hispanos en los Estados Unidos*, edited by Rodolfo J. Cortina and Alberto Moncada. Madrid: Instituto de Cooperación Iberoamericana.

1984

Lisandro Pérez. "Migration from Socialist Cuba: A Critical Analysis of the Literature." *Cubans in the United States*, edited by Miren Uriarte-Gaston and Jorge Cañas Martínez. Boston: Center for the Study of the Cuban Community.

1980

Lisandro Pérez. "The Family in Cuba." *The Family in Latin America*, edited by Man Singh Das and Clifton Jesser. New Delhi: Vikas Publishing House.

***Short monographs, bulletins, and policy papers:***

1998

Lisandro Pérez. "Cuba and Cuban Americans: An Irreconcilable Relationship?" Cuba Briefing Paper, Caribbean Project, Georgetown University, number 16 (January).

1981

Sergio Diaz-Briquets and Lisandro Pérez. *Cuba: The Demography of Revolution*. Washington, D.C.: Population Reference Bureau, vol. 36, no. 1 of the PRB Population Bulletin Series. 41 pp. Portions reprinted

as a chapter in *Cuban Communism*, edited by Irving Louis Horowitz (5th ed.; Transaction Books, 1984), 331-66.

1979

Lisandro Pérez. *Working Offshore: A Preliminary Analysis of Social Factors Associated with Safety in the Offshore Workplace*. Baton Rouge: Louisiana State University Center for Wetland Resources, Sea Grant Publication No. LSU-T-79001, March, 66 pp.

1977

Lisandro Pérez and Maisy L. Cheng. *Population Change in Louisiana: 1970-1975*. Baton Rouge: Louisiana Agricultural Experiment Station, Bulletin no. 705. 39 pp.

1977

Lisandro Pérez and Maisy L. Cheng. *Infant Mortality in Louisiana: Levels, Trends, and Differentials*. Baton Rouge: Louisiana Agricultural Experiment Station, Bulletin no. 698. 35 pp.

### ***Encyclopedia articles:***

2002

Lisandro Pérez

"Cuban Americans." *Encyclopedia of World Cultures: Supplement*, edited by Melvin Ember, Carol R. Ember, and Ian Skoggard. New York: MacMillan Reference USA.

1997

Guillermo J. Grenier and Lisandro Pérez. "Cubans." *American Immigrant Cultures: Builders of a Nation*, edited by David Levinson and Melvin Ember. New York: MacMillan Reference USA.

1989

Lisandro Pérez. "Cubans in the South." *Encyclopedia of Southern Culture*. Center for the Study of Southern Culture, University of Mississippi, 1989.

1980

Lisandro Pérez. "Cubans." *Harvard Encyclopedia of American Ethnic Groups*, edited by Stephen Thernstrom. Cambridge: The Belknap Press of Harvard University Press.

***Short articles, editorships, and miscellaneous publications:***

1993

Lisandro Pérez. "Cubans in the United States: The Paradoxes of Exile Culture." *Culturefront* (published by the New York Council for the Humanities), vol. 2, number 1 (Winter), 12-16.

1992

Lisandro Pérez. "Commentary: Unique but Not Marginal: Cubans in Exile." *Cuban Studies Since the Revolution*, edited by Damián J. Fernández. Gainesville: University Presses of Florida.

1991

Lisandro Pérez. "Miami Ethnic Mix." *Miami City Guide*. APA Publications.

1990

Lisandro Pérez. Guest Editor, vol. 20, *Cuban Studies/Estudios Cubanos* (University of Pittsburgh Press). Issue is devoted to the Cuban community in Miami.

1989

Lisandro Pérez. "Cuba and the American Left." *Hemisphere*, vol. 2, no. 1 (Fall), 13-14.

1982

Lisandro Pérez. "Comment: Cubans and Mexicans in the United States." *Cuban Studies/Estudios Cubanos*, 11:2/12:1 (July-January), 99-103.

1982-1988

Contributing Editor, *Handbook of Latin American Studies* (annual publication of the Library of Congress). Section, Sociology: the Caribbean and the Guianas, vols. 45-51.

1975-1982

Contributing Editor, *Handbook of Latin American Studies*. Section, Sociology: South America, the Andean countries, vols. 37-43

1983

Lisandro Pérez. "History of a People in a Cloud of Smoke." Op-Ed Essay. *The New York Times*, July 23, 1983, p. 17.

1985-1994

Member, Board of Contributors, *The Miami Herald*. Author of occasional essays that have appeared in the Sunday editions of *The Herald* and *El Nuevo Herald*.

***Book reviews in the following journals:***

*Journal of the American Statistical Association*, *Cuban Studies*, *Society*, *Hemisphere*, *Rural Sociology*, *Caribbean Review*, *Nieuwe West-Indische Gids*/New West Indian Guide, *Inter-American Review of Bibliography*.

## **FELLOWSHIPS AND EXTERNALLY-FUNDED RESEARCH AND PROGRAMS**

Co-Principal Investigator, "US/Cuba Policy: The Transition in Cuba and in the Cuban-American Community." Two-year grant of \$100,000 awarded by The Christopher Reynolds Foundation to support research on the role of the Cuban-American community in a Cuban transition, 2000-2002.

Principal Investigator, "Cuban Women Writers' Project." One-year grant of \$12,000 awarded by the General Service Foundation to bring together women writers from Cuba and from the Cuban diaspora, 2000.

Principal Investigator, "A Program of Research Collaboration with Cuba." Two-year grant of \$100,000 awarded by The John D. and Catherine T. MacArthur Foundation to expand and intensify collaborative research programs with colleagues and academic institutions in Cuba, 2000-2001.

Principal Investigator, "Academic Exchange and Collaboration with U.S. Nonprofits and Cuba." Two-year grant of \$28,000 awarded by The Christopher Reynolds Foundation, Inc. to support the expansion of the CRI's programs of exchange and collaborations with Cuban academics and its role as a resource for contacts between U.S. nonprofits and Cuban institutions, 1999-2001.

Principal Investigator, AA Program of Academic Travel and Research Collaboration with Cuba." Two-year grant of \$74,127 awarded by the Ford Foundation to expand the scope of the previous grants "Travel to Cuba," and "A Program of Academic Travel and Research Collaboration with Cuba," 1998-2001.

Principal Investigator "Cuba and US Nonprofits: A Resource Guide and Directory." Two-year grant of \$100,873 awarded by the Ford Foundation to develop a guide and directory to facilitate contact of U.S. nonprofits with appropriate institutions in Cuba, 1998-2001.

Visiting Scholar, Russell Sage Foundation, New York City, September 1997-August 1998.

Principal Investigator, "Island and Diaspora: Cuban National Sovereignty, Identity, and Reconciliation in the 21st Century." Four-year, \$250,000 grant from the Rockefeller Foundation for a program of resident fellowships in the humanities at the Cuban Research Institute, 1994-98.

Principal Investigator, "A Program of Academic Travel and Research Collaboration with Cuba." Two-year grant of \$50,000 awarded by the Ford Foundation to expand the scope of the previous grant "Travel to Cuba," 1995-1997.

Principal Investigator, "Travel to Cuba." Three-year grant of \$28,000 awarded by the Ford Foundation to support travel of FIU faculty to Cuba and for visits from colleagues in Cuba, 1992-1995.

Principal Investigator, "Cuba in Transition." One-year grant of \$500,000 awarded in June 1992 by the Office of Research of the U.S. Department of State and the Agency for International Development for research on economic and political issues relevant to a transition in Cuba.

Principal Investigator, "Blacks and Latinos in Greater Miami." One-year grant of \$20,000 awarded by the Inter-University Program for Latino Research on April 1992. Programs of research and public affairs events on relations between African-Americans and Latinos.

Social Science Research Council Fellow, August 1980 to August 1981. Awarded by the Joint Committee on Latin American Studies of the Social Science Research Council and the American Council of Learned Societies. Title of the project: "The Social Demography of Twentieth-Century Cuba." The fellowship was combined with an academic-year sabbatical leave from Louisiana State University that was spent on research in Washington, D.C.

Tinker Foundation Fellow, Center for Latin American Studies, University of Florida, 1972-74.

## **MISCELLANEOUS PROFESSIONAL ACTIVITIES**

Member of the Advisory Committee of the Sydney S. Spivack Program in Applied Social Research and Social Policy of the American Sociological Association, 1996-98.



Chair of the Joint Committee of the Inter-University Program for Latino Research and the Social Science Research Council for Hispanic Public Policy Issues, 1991-1995.

Member of the Board of Directors of the Inter-University Program for Latino Research, 1990-.

Consultant on U.S. Latino communities and their cultures, Children's Television Workshop, New York, 1992.

Member of the Latino Advisory Committee of the National Museum of American History, Smithsonian Institution, 1994-.

Member of the Executive Committee and the Board of Directors, Institute of Cuban Studies, 1980-1999.

Member of the Advisory Board for the journal *Cuban Studies/Estudios Cubanos*, 1981-1998.

**COURSES TAUGHT** at Louisiana State University:

- 2001 Introduction to Sociology
- 2351 Rural Sociology
- 2505 Marriage and Family Relationships
- 2721 The City
- 4361 Latin American Societies
- 4401 The Family
- 4411 Sociology of Work
- 4701 Population and 4702 Population Lab
- 7391 Seminar: Latin American Societies
- 7791 Seminar: Population Analysis

Directed five M.A. theses and two Ph.D. dissertations of students in the Department of Sociology and in the Institute of Latin American Studies. Served as a member of M.A. and Ph.D. committees of students in the departments of sociology, history, economics, geography, extension education, and Latin American Studies.

**COURSES TAUGHT** at Florida International University:

- 2000 Introduction to Sociology
- 3300 Research Methods
- 3120 Marriage and the Family
- 3331 World Issues and Prospects
- 4010 Classical Sociological Theories
- 4343 Cuban Culture and Society
- 4621 Cubans in the U.S.
- 5447 Seminar: Sociology of International Development

**MAJOR ACCOMPLISHMENTS AS CHAIR OF SOCIOLOGY/ANTHROPOLOGY (1985-1991)**

Creation of eight new faculty positions and conducted the recruitment and hiring for those positions.

Developed the plan and materials for the Department's M.A. and Ph.D. programs and obtained the approval for the programs from the University and the State Board of Regents.

Successfully steered the Department through a Board of Regents external review of the B.A. program, which resulted in a highly positive evaluation.

**MAJOR ACCOMPLISHMENTS AS DIRECTOR  
OF THE CUBAN RESEARCH INSTITUTE (1991-)**

Obtained \$1,263,000 in external grants for programs of the CRI, including a highly-competitive Humanities Fellowship Program from the Rockefeller Foundation.

Awarded the editorship of the journal *Cuban Studies*, the oldest and leading journal in the field, for a five-year term as a result of a competitive selection process conducted by the University of Pittsburgh Press.

Established and organized, starting in 1997, the CRI Conference on Cuban and Cuban American Studies, held every 18 months on the FIU campus and attracting more than 200 scholars from across the U.S., Latin America and Europe. The 4th Conference will be held in March 2002. It has become the most important conference in the field.

Instituted a Certificate Program in Cuban and Cuban American Studies at both the undergraduate and graduate levels.

Established the first Study in Cuba Program for FIU students in the summer of 2001. Twenty-three students spent 12 days in Cuba with FIU faculty members as part of the requirements for course credit.

Supported faculty and graduate research in Cuba. More than twelve FIU faculty members and eight graduate students have been supported by the CRI for research-related travel to Cuba. The CRI has also

supported travel to FIU by some 40 colleagues from Cuba.

A long tradition of sponsorship of lectures, seminars, cultural events, book presentations, and symposia attended by faculty, students, and the community.

## ATTACHMENT B

### Sources on the Cuban Community in Miami

#### SOURCES ON THE CUBAN COMMUNITY IN MIAMI

Bettinger-López, Caroline

2000 *Cuban-Jewish Journeys: Searching for Identity, Home, and History in Miami*. Knoxville: University of Tennessee Press.

Boswell, Thomas D. and James R. Curtis

1984 *The Cuban-American Experience: Culture, Images and Perspectives*. Totowa, N.J.: Rowman and Allenheld.

Castro, Max J.

1992 The Politics of Language in Miami. In Guillermo J. Grenier and Alex Stepick III (eds.), *Miami Now: Immigration, Ethnicity, and Social Change* (pp. 109-132).

Fagen, Richard R., Richard A. Brody, and Thomas J. O'Leary

1968 *Cubans in Exile: Disaffection and the Revolution*. Stanford: Stanford University Press.

García, María Cristina

- 1996 *Havana USA: Cuban Exiles and Cuban Americans in South Florida, 1959-1994*. Berkeley: University of California Press.

Grenier, Guillermo J.

- 1992 The Cuban-American Labor Movement in Dade County: An Emerging Immigrant Working Class. In Guillermo J. Grenier and Alex Stepick III (eds.), *Miami Now: Immigration, Ethnicity, and Social Change* (pp. 133-159).

Grenier, Guillermo J. and Lisandro Pérez

- 1996 Miami Spice: The Ethnic Cauldron Simmers. In Silvia Pedraza and Rubén G. Rumbaut (eds.), *Origins and Destinies: Immigration, Race, and Ethnicity in America* (pp. 360-372). Belmont, California: Wadsworth Publishing Company.
- 1998 Refugees to Immigrants: The Rise of the Cuban American Community in Miami. In Gregory R. Campbell (ed.), *Many Americas: Critical Perspectives on Race, Racism, and Ethnicity* (pp. 217-229). Dubuque, Iowa: Kendall/Hunt Publishing.

Masud-Piloto, Felix Roberto

- 1988 *With Open Arms: Cuban Migration to the United States*. Totowa, N.J.: Rowman & Littlefield.
- 1996 *From Welcomed Exiles to Illegal Immigrants*. Lanham, Maryland: Rowman & Littlefield.

## Pedraza, Silvia

- 1996 Cuba's Refugees: Manifold Migrations. In Silvia Pedraza and Rubén G. Rumbaut (eds.), *Origins and Destinies: Immigration, Race, and Ethnicity in America* (pp. 263-79). Belmont, California: Wadsworth Publishing Company.

## Pedraza-Bailey, Silvia

- 1985 *Political and Economic Migrants in America: Cubans and Mexicans*. Austin: University of Texas Press.

## Pérez, Lisandro

- 1986a Cubans in the United States. *Annals of the American Academy of Political and Social Science* 487(September): 126-137.
- 1986b Immigrant Economic Adjustment and Family Organization: The Cuban Success Story Reexamined. *International Migration Review* 20(1): 4-20.
- 1992 Cuban Miami. In Guillermo J. Grenier and Alex Stepick III (eds.), *Miami Now: Immigration, Ethnicity, and Social Change* (pp. 83-108). Gainesville: University Press of Florida.
- 1994a Cuban Catholics in the United States. In Jay P. Dolan and Jaime R. Vidal (eds.), *Puerto Rican and Cuban Catholics in the U.S., 1900-1965* (pp. 145-208). Notre Dame: University of Notre Dame Press.
- 1994b Cuban Families in the United States. In Ronald L. Taylor (ed.), *Minority Families in the United States: A Multicultural*

*Perspective* (pp. 95-112). Englewood Cliffs, N.J.: Prentice-Hall.

- 1996 The Households of Children of Immigrants in South Florida: An Exploratory Study of Extended Family Arrangements. In Alejandro Portes (ed.), *The New Second Generation* (pp. 108-118). New York: Russell Sage Foundation.
- 1999 The End of Exile? A New Era in U.S. Immigration Policy Toward Cuba. In Max J. Castro (ed.), *Free Markets, Open Societies, Closed Borders? Trends in International Migration and Immigration Policy in the Americas* (pp. 197-211). Coral Gables, Florida: North-South Center Press at the University of Miami.
- 2000 De Nueva York a Miami: El desarrollo demográfico de las comunidades cubanas en Estados Unidos. *Revista Encuentro de la Cultura Cubana* 15(Winter): 13-23.
- 2001 Growing Up in Cuban Miami: Immigration, the Enclave, and New Generations. In Rubén G. Rumbaut and Alejandro Portes (eds.) *Ethnicities: Children of Immigrants in America* (pp. 91-125). Berkeley and New York: University of California Press and Russell Sage Foundation.

Pérez Firmat, Gustavo

- 1994 *Life on the Hyphen: The Cuban-American Way*. Austin: University of Texas Press.



## Portes, Alejandro

1969 Dilemmas of a Golden Exile: Integration of Cuban Refugee Families in Milwaukee. *American Sociological Review* 34: 505-18.

1995 Children of Immigrants: Segmented Assimilation and its Determinants. In Alejandro Portes (ed.), *The Economic Sociology of Immigration: Essays on Networks, Ethnicity, and Entrepreneurship* (pp. 248-280). New York: Russell Sage Foundation.

## Portes, Alejandro and Robert L. Bach

1985 *Latin Journey: Cuban and Mexican Immigrants in the United States*. Berkeley: University of California Press.

## Portes, Alejandro and Alex Stepick

1993 *City on the Edge: The Transformation of Miami*. Berkeley: University of California Press.

## Rieff, David

1987 *Going to Miami: Exiles, Tourists, and Refugees in the New America*. Boston: Little, Brown and Company.

## Rodríguez Chávez, Ernesto

1999 *Cuban Migration Today*. La Habana: Editorial José Martí.

## Stack, John F. Jr. and Christopher L. Warren

1992 The Reform Tradition and Ethnic Politics: Metropolitan Miami Confronts the 1990s. In Guillermo J. Grenier and Alex Stepick III (eds.), *Miami Now: Immigration, Ethnicity, and Social Change* (pp. 160-185). Gainesville: University Press of Florida.

Torres, Maria de los Angeles

- 1999 *In the Land of Mirrors: Cuban Exile Politics in the United States*. Ann Arbor: The University of Michigan Press.

Triay, Victor Andres

- 1998 *Fleeing Castro: Operation Pedro Pan and the Cuban Children's Program*. Gainesville: University of Florida Press.
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No. 08-987

Supreme Court, U.S. FILED  MAR 5 - 2009  OFFICE OF THE CLERK
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IN THE  
*Supreme Court of the United States*

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RUBEN CAMPA, RENE GONZALEZ, ANTONIO GUERRERO,  
GERARDO HERNANDEZ, AND LUIS MEDINA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF OF THE WILLIAM C. VELSAQUES  
INSTITUTE AND THE MEXICAN AMERICAN  
POLITICAL ASSOCIATION AS *AMICI CURIAE*  
IN SUPPORT OF THE PETITION FOR WRIT OF  
CERTIORARI**

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<i>Teague v. Lane</i> , 489 U.S. 288 (1989) .....	5
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## INTRODUCTION

### I. Interest Of *Amici Curiae*<sup>1</sup>

Under Rule 37 of the Supreme Court Rules, the William C. Velasquez Institute, Inc., a Texas Non Profit Corporation (WCVI), respectfully submits the attached brief of *amici curiae* in support of Petitioners Ruben Campa, Rene Gonzalez, Antonio Guerrero, Gerardo Hernandez and Luis Medina's Petition for Certiorari in this matter.

The William C. Velásquez Institute (WCVI) is a Texas tax-exempt, non-profit, non-partisan public policy analysis organization chartered in 1985. The purpose of WCVI is to conduct research aimed at improving the level of political and economic participation in Latino and other underrepresented communities, provide information to Latino leaders relevant to the needs of their constituents, inform the Latino leadership and public about the impact of public policies on Latinos, inform the Latino leadership and public about political opinions and behavior of Latinos.

The Mexican American Political Association, Inc. (MAPA), is a California Non-profit corporation,

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<sup>1</sup> The parties have consented to the filing of this brief. Counsel of record of all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.



founded in Fresno, California in 1960. MAPA is dedicated to the constitutional and democratic principle of political freedom and representation for the Mexican and Hispanic people of the United States of America. MAPA works to empower Latinos in the areas of education, immigration, and equal access to justice and political participation.

WCVI and MAPA have a particular interest in ensuring the equal protection of Federal, State and Local Laws, the prevention of discrimination in all aspects of public life, and the prevention of discrimination in the application of justice in the legal system on behalf of all U.S. Citizens, especially Latinos and other underrepresented communities.

WCVI and MAPA file this Amicus Curie brief to support the Petition for Certiorari on the issue of the misapplication of the *Batson* standard by the Eleventh Circuit for the review of allegation of the discriminatory use of peremptory challenges to strike African American venirepersons from sitting on the jury.

## **II. Procedural History**

During the selection of the Jury in the District Court, the prosecution was given 11 regular peremptory challenges plus 2 peremptory challenges of alternates. *U.S. v. Campa*, 529 F.3d 980, 989 (11th Cir., 2008) (*Campa II*). The prosecution exercised nine of its eleven regular challenges and both of its alternative challenges. With these challenges the prosecution struck seven African American members of the venire, five during the selection of the jury and 2 during the selection of the alternative. *Id.* This represents 77.7% of the prosecution's peremptory

challenges used to eliminate African American jurors. The empaneled jury included three African American jurors and one African American Alternate. *Id.*

The defendants challenged the prosecution's peremptory challenges of African American venirepersons as racially discriminatory under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). (*U.S. v. Campa II*, 529 F.3d at 998) For each objection, the District Court did not make a finding as to whether the defense had established a prima facie case, but ordered the prosecution to explain the strike. *Id.* For the first four challenged strikes (but not the fifth) the District Court gave the defense an opportunity to respond to the prosecution's explanation. Thereupon, the District Court rejected all five *Batson* challenges.

WCVI asserts that the Eleventh Circuit panel failed to follow the *Batson* in that it held that, as a matter of law, the defendants did not establish a prima facie case of discrimination under the first prima facie step of *Batson* because "[t]he government chose not to use two of its peremptory challenges at all, and the jury included three black jurors and an alternate black juror." *Campa II*, 529 F.3d at 998. The panel, therefore, concluded that "[n]o *Batson* violation occurred." *Id.* In doing so, the Court did not review or consider all relevant circumstances, it discussed no factors other than the fact that African American jurors were empaneled and that the prosecution did not use all of its peremptory challenges. The Eleventh Circuit's "per se rule" is inconsistent with the analysis dictated in *Batson* which requires a consideration of all relevant circumstances in evaluation whether racial

discrimination has occurred in the prosecutor's use of peremptory challenges. *Batson*, 476 U.S. 96-97.

WCVI will argue that the Eleventh Circuit "per se rule," (1) ignores existing Supreme Court precedent, (2) conflicts with the rulings in other circuits, and (3) implicates important issues of the discriminatory use of peremptory challenges.

## ARGUMENT

### **I. The Eleventh Circuit Ruling Contradicts Existing Supreme Court Precedent**

The United States Supreme Court has held that:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, (citations omitted), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

*Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (*Batson*).

In evaluating whether the government has engaged in the racially discriminatory use of peremptory challenges, the United States Supreme Court has established a three step analysis. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the

prosecution must offer a race neutral basis for striking the juror in question. Third, in light of the parties submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Batson*, 476 U.S. at 93-94; *Snyder v. Louisiana*, 552 U.S. \_\_\_, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008).

*Batson* holds that in deciding whether the defendant has made the requisite showing of racial discrimination, the Trial Court should consider all relevant circumstances. *Batson*, 476 U.S. at 96-97 (this includes evidence of the race of defendant, pattern of strikes, prosecutor's questions and statements during *voir dire* examination, and any other "relevant circumstances" which "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"). A prima facie case of discrimination can be made by offering a wide variety of evidence, so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." *Batson*, 476 U.S., at 94 (emphasis added); *Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005).

Moreover, the U.S. Supreme Court has consistently held that the prima facie step requires an examination of the totality of circumstances. *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334(1989) (prosecutor used all peremptory challenges to remove African Americans from the jury); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (defendant's use of two of three peremptory strikes in civil litigation to remove two African

Americans while leaving one African American on the jury was sufficient to establish a prima facie case of impermissible racial discrimination requiring the defendant to assert a non discriminatory reason for the use of peremptory challenges), *Johnson v. California*, 545 U.S. at 168-169 (prosecutor used peremptory challenges to remove all African Americans from the jury); *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2410, 162 L.Ed.2d 129(2005) (prosecutors used peremptory challenges to remove ten of eleven African Americans from a jury).

Moreover, the first prima facie step was not intended to "be so onerous" that a defendant would have to persuade the judge that the challenge was the product of purposeful discrimination. *Johnson v. California*, 545 U.S. at 170. Rather a defendant satisfies the first step by producing sufficient evidence to permit the trial judge to draw an inference that discrimination has occurred. *Id.* Where a defendant has raised an inference of a racially discriminatory use of peremptory challenges, the prosecutor must then produce evidence (*i.e.*, an explanation of the reasons for the striking African Americans from the jury) such that the Court can evaluate the totality of circumstances to determine whether purposeful discrimination has taken place. *Id.*

The U.S. Supreme Court has also held that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose"; *Snyder v. Louisiana*, 128 S.Ct. at 1208, *citing United States v. Lane*, 866 F. 2d 103, 105 (4th Cir. 1989); *United States v. Clemons*, 843 F. 2d 741, 747 (3th Cir. 1988); *United States v. Battle*, 836 F. 2d 1084, 1086

(8th Cir. 1987); *United States v. David*, 803 F. 2d 1567, 1571 (11th Cir. 1986). The Supreme Court has consistently required the trial court to fully evaluate the totality of circumstances even where the prosecutor has left African Americans on the jury, or failed to use all peremptory challenges. (*Edmonson v. Leesville Concrete Co.*, 500 U.S. at, 631 (defendant in a civil case removed two African Americans and left one African American on the jury); *Miller-El v. Dretke*, 545 U.S. at 239 (prosecutors used peremptory challenges to remove ten of eleven African Americans from a jury). Thus, the Eleventh Circuits per se rule allows the prosecutor to shield the purposeful racially motivated striking of African American jurors by either not using all peremptory challenges, or allowing a few African Americans on the jury, an outcome permitting actual discrimination by contrivance.

## **II. The Eleventh Circuit's Per Se Ruling Conflicts With Rulings In Other Circuits**

The Eleventh Circuit's per se rule that no prima facie case is stated where the prosecutor has not used all peremptory challenges and has left African Americans on the jury has been considered and rejected by the Third Circuit. *Hardcastle v. Horn*, 368 F.3d 246, 256, 258 (3rd Cir., 2004); *Jones v. Ryan* 987 F.2d 960, 971-73 (3rd Cir., 1993). *Hardcastle* held that "one way to show a prima facie case at step one is to show a pattern of peremptory challenges of a juror of a particular race. (368 F.3d at 256.) The court further held that the defendant made a prima facie case, but that the prosecution failed to offer any non discriminatory reasons for striking twelve



African American venirepersons. *Id.* Moreover, the fact that the prosecutor had enough unused peremptory challenges to remove two remaining African American jurors, but chose not to do so, cannot demonstrate the absence of discriminatory intent in striking the other twelve African American jurors. *Id.* Moreover, Seventh Circuit rulings are consistent with the Third Circuit rule in that it also found a *prima facie* claim and granted *Batson* relief even where African American jurors were empaneled. *Coulter v. Gilmore*, 155 F.3d 912, 918-919 (7th Cir., 1998) ; *United States v. Briscoe*, 896 F.2d 1476, 1487, 1489 (7th Cir., 1990).

More importantly, other circuits have used the fact that a prosecutor had unused peremptory challenges and left African Americans on an empaneled jury as two of many factors to be considered during the Court determination of whether there exists racial discrimination in the use of peremptory challenges (step three of the *Batson* analysis). See *Allen v. Lee*, 366 F.3d 319, 329 (4th Cir. 2004) (unused prosecutor's peremptory strikes and empaneled African American jurors are factors along with the racial make up of venire and questions and answers during *voir dire*); *United States v. Walton*, 908 F.2d 1289 (6th Cir., 1990) (two unused prosecution peremptory strikes considered along with percentage of strikes directed at African American venirepersons); *Aspen v. Bissonette*, 480 F.3d 571, 577 (1st Cir., 2007) (considered the use of peremptory challenges to target members of a particular group); *Jordon v. Lefevre*, 293 F.3d 587, 594-95 (2nd Cir. 2002) (placing two African American on the jury considered along with answers given by prospective



juror during *voir dire*, prosecutor's reasons justifying its strikes and comparison with other similarly situated jurors). Unlike the approach of Third, Seventh and other Circuits, the Eleventh Circuit's per se rule differs in that unused prosecution's peremptory challenges and placement of African American juror on the panel are dispositive of the issue of discriminatory practice, and precludes a review of the totality of factors and circumstances required by the third step of the *Batson* analysis.

### **III. The Eleventh Circuit Rule Raises Important Issues Of Access To Justice Free From Racial Discrimination**

The focus of the Eleventh Circuit's per se rule is on the make up of the empaneled jury, not on the selection process of the jury, nor on the reasons for striking African American jurors. The Eleventh Circuit rule deviates from *Batson*. *Batson* requires that once a defendant presents sufficient evidence to raise an inference that discrimination has occurred, the prosecution is required to present reasons for the use of peremptory strikes. This evidence allows the court to analyze, based on the totality of circumstances, whether the prosecution has improperly rejected potential jurors on the basis of race. The focus in *Batson* is not on the outcome of the selection process, but the process itself. Compare *Thornburg v. Gingles*, 478 U.S. 30, 74-76, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1985) (the success of some black candidates in districts challenged under Section 2 of the Voting Rights Act (42 U.S.C. § 1973) does not foreclose the possibility of vote dilution of the black vote; "[w]here multimember districting generally

works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters," 478 U.S. at 76).

Protecting the integrity of the judicial system is undermined by the Eleventh Circuit's per se rule. The U.S. Supreme Court has recognized that not only are defendants harmed, but "but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice,'" *Miller-el v. Dretke*, 545 U.S. at 168-169 citing *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). This Court has also recognized that even beyond the impact on defendants and racial minorities, there is a greater impact on society as a whole:

Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U. S., at 87; see also *Smith v. Texas*, 311 U. S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940)

*Johnson v. California*, 545 U.S. at 171-172.

The U.S. Supreme Court has recognized that "there can be no dispute that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. 96, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244(1953). To allow the Eleventh Circuits per se rule to stand is to allow prosecutors to strike racial minorities from juries and avoiding scrutiny by allowing a single minority to remain on the jury. Thus, this Court should review this case to make a consistent process which ensure that no peremptory strikes are used in a racially discriminatory manner in any Circuit.

### CONCLUSION

For the reasons set forth herein above, and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

## APPENDIX A

**Chronology of News Accounts Concerning  
Cuba-Related Violence in Miami Area**

Date	Incident
1987-1989	<p data-bbox="315 492 844 531"><i>(Miami Herald, 6/15/1990, p.1A)</i></p> <p data-bbox="315 569 970 1651">On May 2, 1987, two bombs exploded at businesses in Miami that ship packages and goods to Cuba: Almacen Espanol, and Cubanacan. On May 25, 1987, a bomb exploded at Cuba Envios, a Miami business that ships goods to Cuba. On July 30, 1987, a bomb exploded at Machi Viajes a Cuba, a travel agency for travel to Cuba. On August 27, 1987 a bomb exploded outside of Va Cuba, a business that sends packages to Cuba. On January 2, 1988, a bomb exploded in Miami Cuba, a business that sends medical supplies to Cuba. On February 21, 1988 a bomb threat was made against Iberia Airlines to protest Spain's ties with Cuba. On May 3, 1988, a bomb exploded outside the Cuban Museum of Arts and Culture to protest an exhibition of art by Cubans that came to the United States with the 1980 Mariel boatlift. On September 5, 1988 a bomb exploded at Bele Cuba Express, a business that ships packages to Cuba. On February 25, 1989, police removed a bomb from behind Almacen El Espanol, a business</p>

	that ships packages to Cuba. On March 26, 1989, two bombs exploded at Marazul Charters, a travel agency for trips to Cuba.
Jun. 14, 1990	<p>(<i>Miami Herald</i>, 6/15/1990, p.1A)</p> <p>A bomb exploded at the Cuban Museum of Arts and Culture, which exhibits works of art by Cubans living in exile and in Cuba. Federal investigators labeled the bombing "a terrorist act." The bomb "blew out the front door, destroyed a section of the roof and damaged at least three pieces of art inside, including a statue that was beheaded by flying debris."</p>
Feb. 1992	<p>(<i>Dallas Morning News</i>, 11/28/1992, p.1A)</p> <p>Three assailants barged into Miami radio station on one of whose programs openly advocates dialogue with Cuba. The assailants "beat and tied up an employee and vandalized equipment." Businesses pulled their ads off of the show, stating that "they were sorry, but there were threats that their business would die or worse if they kept advertising." The show's director "had lost count of the number of death threats" made against him.</p>
Feb. 11, 1992	<p>(<i>Columbia Journalism Review</i>, May/June 1992, p.42)</p> <p>After being criticized for the <i>Miami</i></p>

	<p><i>Herald's</i> editorial positions on United States-Cuba matters, <i>Herald</i> publisher David Lawrence and two other editors received death threats. In addition, the paper received telephoned bomb threats and its vending machines were defaced with feces.</p>
1992-1993	<p>(<i>Florida Trend</i>, Aug/1993 p.22)</p> <p>InterConsul, a Little Havana business that sent care packages to Cuba, was forced to close down following arson-related fires.</p>
Jan.-Feb. 1993	<p>(<i>El Nuevo Herald</i>, 1/24/1993 p.1B &amp; 2/14/1993 p.1B)</p> <p>Alliance of Cuban Youth staged protests in front of Benetton shops in Miami's Dadeland and International Mall to protest the opening of five Benetton shops in Cuba. Employees of the Miami shops were the object of threats and insults by Cuban exile protesters.</p>
Nov. 4, 1993	<p>(<i>Orlando Sentinel</i>, 11/5/1993 p.D5 &amp; 11/8/1993 p.A1; <i>New York Times</i>, 11/6/1993, section 1 p.9)</p> <p>Miami-based exile organization Alpha-66 announced a campaign of attacking tourist facilities, foreign tourists and Cuban exiles in Cuba. At a new conference, Alpha 66 showed a video tape of Commander Homero, an Alpha member who warned that "all</p>



	<p>foreigners or people lodged in Cuban hotels are considered enemies of the Cuban people." Romero added, "We will use force... including the possibility of kidnapping tourists for ransom." Alpha-66 also sent letters to all foreign embassies in the United States advising of them of the threat against tourists.</p>
Mar. 11, 1994	<p>(<i>Chicago Tribune</i>, 6/24/1994 p.8)</p> <p>Alpha-66 took credit for a March 11, 1994 gunfire attack on a hotel in the beach resort of Varadero, Cuba. Alpha-66 reported that its commandos fired on the hotel from a boat off shore to deter tourists from traveling to the island. Three months later, Alpha 66 again announced additional raids on Cuba from bases in the Caribbean as part of a campaign to target Cuba's tourism industry.</p>
May-Nov. 1994	<p>(<i>Human Rights Watch Free Expression Project</i>, 11/1994 pp.2-7)</p> <p>In April, Cuban exiles living in Miami attended a conference on emigration held in Havana. Upon their return to Miami, many of them were "besieged by death threats, bomb threats, verbal assault, acts of violence, and economic retaliation." Some were physically assaulted; houses were pelted with eggs. Radio broadcasts identified participants by name and encouraged the anti-Castro community to assemble</p>

	<p>in mobs around their homes to "repudiate" them. No arrests were made. Human Rights Watch reported that in Miami "only a narrow range of speech is acceptable, and views that go beyond these boundaries may be dangerous to the speaker. Government officials and civic leaders have taken no steps to correct this state of affairs."</p>
Sep. 6, 1994	<p>(<i>Human Rights Watch Free Expression Project</i>, 11/1994 p.5)</p> <p>The offices of <i>Replica</i> magazine were bombed with two molotov cocktails. The magazine's editor, Max Lesnick, had attended the Havana conference.</p>
May 20, 1995	<p>(<i>San Diego Union</i>, 6/12/1995 p.B3)</p> <p>Exile group Alpha 66 took credit for the strafing of a hotel in Varadero as part of its campaign to intimidate tourists from vacationing in Cuba.</p>
Jan. 12, 1996	<p>(<i>CubaINFO Johns Hopkins University</i>, 2/8/1996 p.8; <i>Miami Herald</i>, 1/24/1996 p. 3B; <i>Associated Press</i>, 1/23/1996; <i>Reuters</i>, 1/23/1996; <i>Miami Herald</i>, 1/19/1996; <i>Reuters</i>, 1/18/1996)</p> <p>Five members of the United Liberation Commandos, an anti-Castro group, sailed "apparently ... for Cuba" as far as Marathon Key before their boat was intercepted by U.S. Customs. Agents found bomb-making plans and materials on the boat.</p>

Feb. 28, 1996	<p>(<i>Miami Herald</i>, 2/28/1996 p.1A)</p> <p>In aftermath of downing of planes by Cuba Air Force, the organization Cuban Youth "asked motorists 'opposed to injustice' to drive to Miami International Airport at noon Friday and repeatedly crawl past the terminals, clogging the airport."</p>
Mar. 1, 1996	<p>(<i>CubaINFO Johns Hopkins University</i>, 5/23/1996 p.10)</p> <p>Violence broke out between pro- and anti-Castro demonstrators during a demonstration in the aftermath of the downing of two planes by the Cuban Air Force.</p>
Mar. 17, 1996	<p>(<i>Miami Herald</i>, 3/17/1996 p.2B)</p> <p>Four people were taken into custody in Bicentennial Park when anti-Castro protesters tried to break through a police barricade to confront demonstrators protesting the Cuban embargo.</p>
Apr. 12, 1996	<p>(<i>Miami Herald</i>, 4/12/1996 p.16A &amp; 4/13/1996 p.1B)</p> <p>Exile radio stations called for protest of concert to be given by Cuban pianist Gonzalo Rubalcaba. During concert, "bomb-sniffing dogs [were] walking the aisles of the Gusman [Center for the Performing Arts] while, outside ... 200 noisy demonstrators [were] spitting on,</p>

	punching and shouting epithets and profanities at people going into the theater."
Jul. 13, 1996	<p>(<i>CubaINFO Johns Hopkins University</i>, 8/1/1996 p.11; <i>Orlando Sentinel</i>, 7/13/1996 p.D1)</p> <p>Concert to be given at Centro Vasco club in Miami by Cuban singer Rosita Fornes was canceled after firebomb was thrown through window of club.</p>
Aug. 1996	<p>(<i>CubaINFO Johns Hopkins University</i>, 8/29/1996 p.10; <i>Ft. Lauderdale Sun Sentinel</i>, 8/2/1996 p.3B; <i>Bergen Record</i>, 10/20/1996)</p> <p>On August 1, Miami travel agency Marazul Charters, which sells tickets for flights for Cuba, was hit by a firebomb. The agency suffered a similar attack in 1989. On August 21, \$200,000 in damages was caused by the bombing of another similar agency, Maira and Family Services.</p>
Sep. 5, 1996	<p>(<i>CubaINFO Johns Hopkins University</i>, 9/19/1996 p.10; <i>Miami New Times</i>, 9/5/1996)</p> <p>Producers of canceled Rosita Fornes concert received anonymous bomb threats. The producers had to pay "exorbitant fees for extra security and theater fire insurance ... imposed by the City of Miami."</p>
Feb. 6,	( <i>CubaINFO Johns Hopkins University</i> ,

1997	<p>2/6/1997 p.8; <i>Ft. Lauderdale Sun Sentinel</i>, 1/26/1997 p.4B)</p> <p>Article on visit to Miami of Cuban dissident Elizardo Sanchez Santa Cruz states: "There have been numerous incidents in this South Florida city of bombings, death threats, and other harassment of alleged communist sympathizers and performers who have not declared their opposition to the government of Fidel Castro."</p>
Feb. 13, 1997	<p>(<i>CubaINFO Johns Hopkins University</i>, 2/27/1997 p.12)</p> <p>The Miami New Times reported that a group of Cuban exiles were regularly broadcasting a half-hour radio program on sabotage. The program, which was beamed into Cuba from an undisclosed location south of the United States, featured "explicit instructions on techniques in preparing small explosive devices such as Molotov cocktails and suggest[ed] specific targets, such as government vehicles ... for burning or other forms of destruction."</p>
Mar. 25, 1997	<p>(<i>CubaINFO Johns Hopkins University</i>, 4/10/1997 p.10; <i>Miami Herald</i>, 3/26/1997 p.B1; <i>Reuters</i>, 3/26/1997; <i>New York Times</i>, 3/26/1997 p.B9; <i>Ft. Lauderdale Sun Sentinel</i>, 3/25/1997 p.B1)</p> <p>Soon after WRTO began broadcasting</p>

	<p>the latest popular music from Cuba, "station employees received death threats and a bomb scare that forced the evacuation of their building." The station's general manager resigned after announcing that the music would no longer be broadcast.</p>
Oct. 1, 1997	<p>(<i>CubaINFO Johns Hopkins University</i>, 11/13/1997 p.1; <i>Ft. Lauderdale Sun Sentinel</i>, 11/4/1997 p.1; <i>Miami Herald</i>, 10/11/1997 p.1 &amp; 10/31/1997 p.1)</p> <p>Six Cuban Americans were arrested in Puerto Rico on suspicion of plotting to assassinate Fidel Castro. A search of their boat revealed "two 5-caliber sniper rifles, ammunition, fatigue uniforms, field rations and communications equipment."</p>
Aug. 3, 1998	<p>(<i>CubaINFO Johns Hopkins University</i>, 8/20/1998 p.1; <i>Miami Herald</i>, 8/9/1998 p.1; <i>Reuters</i> 8/8/1998; <i>Associated Press</i>, 8/3/1998; <i>Ft. Lauderdale Sun Sentinel</i>, 8/3/1998 p.1; <i>New York Times</i>, 8/16/1998 p.A2)</p> <p>The FBI discovered that Cuban exiles based in Miami were planning to assassinate Fidel Castro during his visit to the Dominican Republic. Guns and explosives to be used in carrying out the plot were found in a Guatemalan hotel.</p>
Aug. 25, 1998	<p>(<i>CubaINFO Johns Hopkins University</i>, 9/10/1998 p.10; <i>Ft. Lauderdale Sun</i></p>

	<p><i>Sentinel</i>, 8/26/1998 p.A1; <i>Reuters</i>, 8/27/1998; <i>Miami Herald</i>, 8/26/1998 p.A1 &amp; 8/25/1998 p. A1; <i>Associated Press</i>, 8/26/1998, <i>Los Angeles Tiems</i>, 8/28/1998)</p> <p>Miami music festival performance by 90-year-old Cuban singer Compay Segundo was interrupted by a bomb threat; "concert-goers were assaulted by protesters camped outside the convention center."</p>
Sep. 26, 1999	<p>(<i>CubaINFO Johns Hopkins University</i>, 10/5/1999 p.7; <i>Miami Herald</i>, 9/28/1999; <i>Reuters</i>, 9/26/1999; <i>Miami Herald</i>, 9/26/1999 p. A1)</p> <p>Concert to be given by Los Van Van at James L. Knight Center was canceled; radio stations had been "clogged with outraged calls."</p>
Oct. 9, 1999	<p>(<i>CubaINFO Johns Hopkins University</i>, 10/27/1999 pp. 9-10; <i>Miami Herald</i>, 10/13/1999, p.B1 &amp; 10/12/1999, p.B1, &amp; 10/11/1999, p.B1)</p> <p>Audience seeking to attend concert given by popular Cuban dance band ("Los Van Van") was "forced to run a gauntlet of [4,000] demonstrators who hurled cans, eggs, rocks and insults. Police pepper-sprayed unruly protesters who tried to break past barricades erected to protect concert-goers. Eleven people were arrested."</p>



Oct. 15, 1999	<p>(<i>Miami Herald</i>, 10/15/1999 p.B1)</p> <p>Vigilia Mambisa announced it would stage demonstration to oppose show given by Cuban pop stars. The group's president said the group would "protest against anyone who comes here from Cuba."</p>
Oct. 20, 1999	<p>(<i>Miami Herald</i>, 10/20/1999 p.B1)</p> <p>A performance by Cuban singer Rosita Fornes at the Seville Beach Hotel was canceled after a bomb threat was phoned in. Her promoters moved the show to the Cristal Night Club, where a group of exiles protested outside.</p>
Nov. 7, 1999	<p>(<i>Miami Herald</i>, 11/7/1999 p. 7NW)</p> <p>Unruly demonstrators smashed windshields of vehicles after the United States Coast Guard used pepper spray and hoses to prevent six Cuban rafters from reaching shore.</p>
Jan. 26, 2000	<p>(<i>National Public Radio</i>, 1/27/2000, Bob Edwards "Morning Edition")</p> <p>During the meeting of Elian Gonzalez's grandmothers at the home of a Dominican nun, Sister Jeanne O'Laughlin A man, Matt Heidenfield, was physically assaulted by a Cuban exile crowd before police come to rescue because he called for Gonzalez's return to Cuba.</p>

Apr. 11, 2000	<p data-bbox="419 196 926 232"><i>(Miami New Times, 4/20/2000)</i></p> <p data-bbox="419 278 1076 556">Outside the home of Elian Gonzalez's Miami relatives, radio talk show host Scott Piasant of Portland, Oregon, wore a t-shirt reading, "Send the boy home" and "A father's rights." Piasant was then physically assaulted by a crowd before police come to rescue.</p>
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